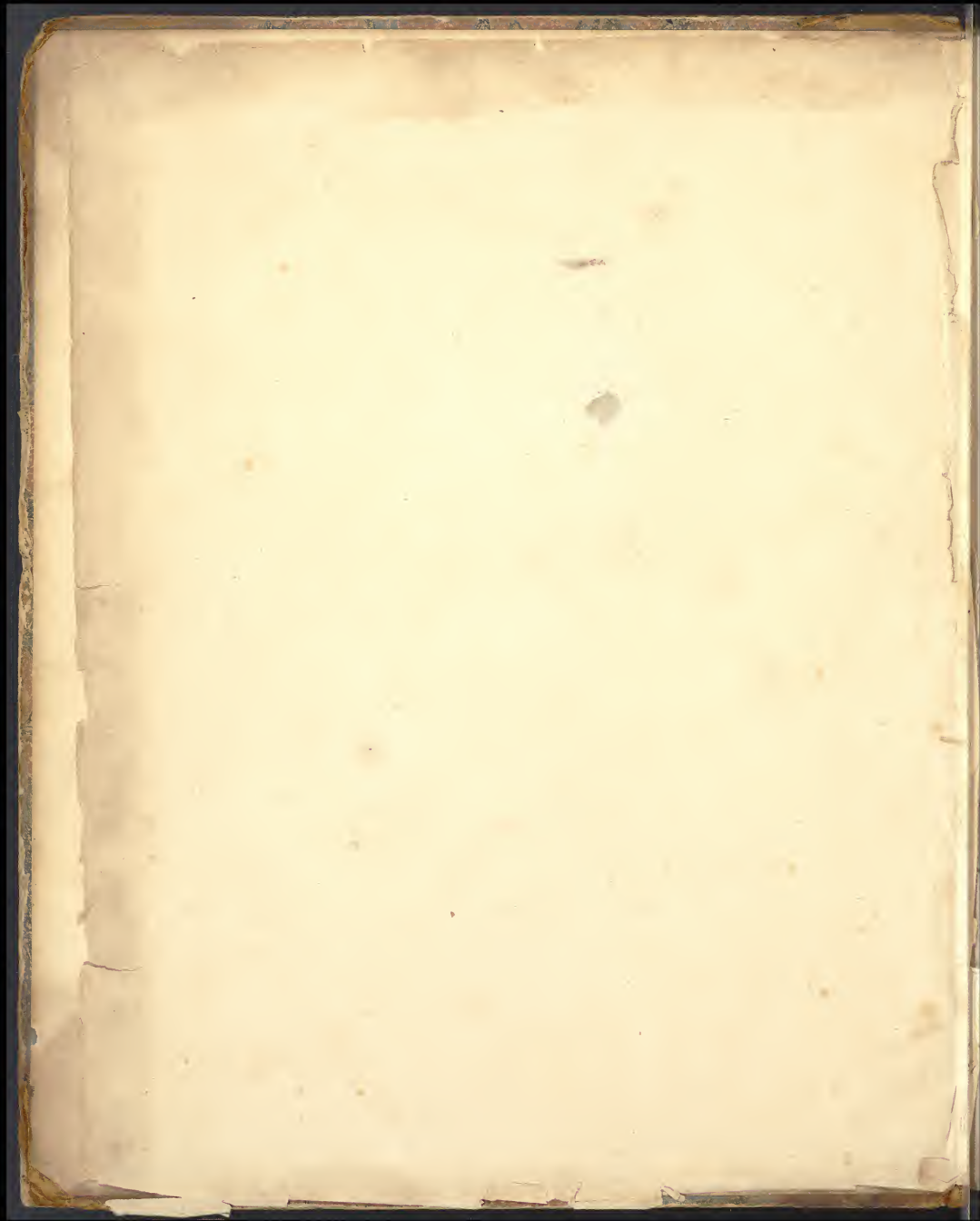


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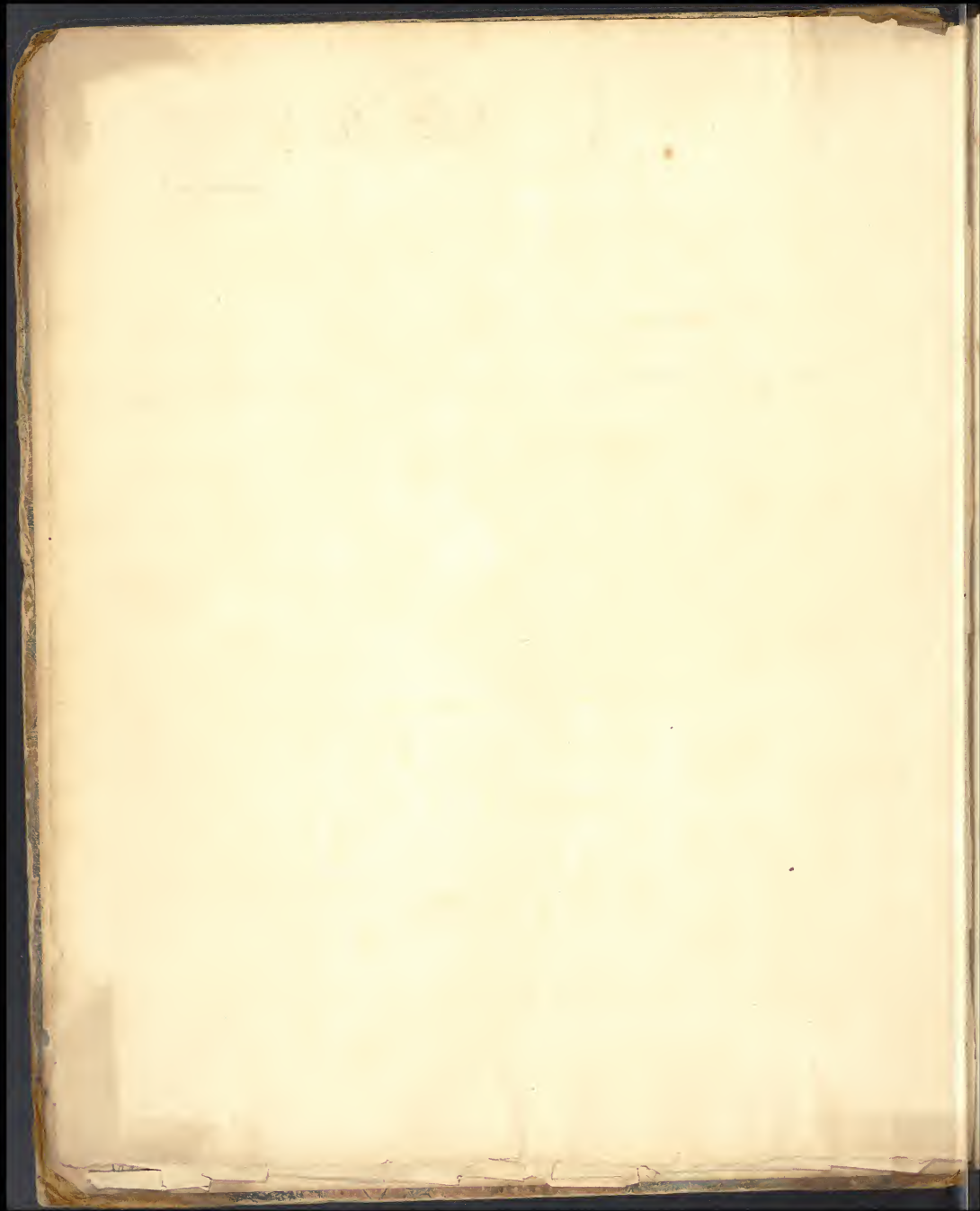
Chas. G. Loring,
Boston.

Lectures on the Law.

==#

"Sola veritas, quamvis jucunda non est, mihi tamen grata est."

1840



Lectures

on

Municipal Law

and

Private Relations

by

The Hon. Judge Reeve, & James Gould Esq.

Delivered at their Law Institution

Litchfield

Connecticut

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Jan 1

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Jun 1

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Aug 1

Municipal Law. by M^r Gould.

Municipal law is defined to be a rule of conduct
due to the sovereign power of the state comman-
ding what is right & prohibiting what is wrong.

September 6th 1872
W. Gould.

Lecture
September 6th 1867
Mr Gould.

Municipal law differs from natural law in this: the latter is a rule of moral conduct, the former of civil conduct. The latter regards men as moral beings, the first as members of a society.

Municipal Law.

Interpretation

There is a difference between a retroactive and an *ex post facto* law.

3. Cal 380.

391.

A retroactive law is any whether civil or penal which has a retroactive effect. An *ex post facto* law, is a penal law which has a retroactive ^{effect}. A retroactive is the genus of which *ex post facto* is the species.

This rule is prescribed by the supreme power, according to the definition, that is by the legislative power. When I treat of unwritten law it will appear that in point of fact all, & municipal laws are not prescribed by the legislative power, tho they in such a manner receive its sanction as to be reconcilable with the ^{union} of the

Interpretation

4. Bac 847.

14. & 29. 2.

6. Wad 145.

1st In the interpretation of the rule the words are to be understood in general, according to their most known usual & popular signification. But terms of art are to be understood according to their acceptance among those learned in the art, & not according to vulgar or main acceptance.

1. H. 53.

Clark 206.

L. Ka 4028.

Palm 450

2^d Where the words of the law or rule are dubious it is always safe to consult the context, & in this way the meaning of a word or phrase in itself dubious may be clearly understood by its relation to the part of the rule. For the same reason it is improper

Municipal Law.

3

Divisions of this Law.

To consult Law in *per se* material as an official method of discovering the intention of the Legislature.

3. The words of the rule are always to be understood as having reference to the subject matter of it, as many words have two significations.

4. The effects & consequences of different constructions are to be regarded, as if one would lead to a consequence rational & just, & the other to an unreasonable & unjust, the former must be adopted.

5. But the last & cardinal rule to which all others are subordinate is that the letter & spirit of the Law be consulted.

But of this rule arises what is called the equity of the Law by which is meant a correction according to the reason & spirit of the Law.

Municipal Law is divided into the *lex scripta* & *non scripta*.

The unwritten Law consists of three branches.

1. The Common Law so called.

2. Of particular Customs.

3. Of Laws peculiar to certain particular jurisdictions.

These three species constitute the whole of the unwritten Law, & are all customary Laws, that is founded in usage immemorial.

Municipal Law

Common Law.

The unwritten law & Common Law are convertible terms, the CL being but a branch of the unwritten law.

1 Bl. 64
87

These ^{or customary} laws are called unwritten because their original institution is not in writing as acts of parliament, and their authority is derived from ~~established~~ ^{derived from} an immemorial usage.

Common Law

The CL is a general custom & appears to be called common because it is common to the whole realm or state, & is not confined to particular districts like the two other branches of unwritten law.

This also depends upon immemorial usage for its support, that is an universal reception from time immemorial. It is

1 Bl. 64.

2 D. 91.

2 Ro. 260.

A usage to be immemorial must extend back beyond legal memory, which is now dated from the reign of R. 1 the latter part of the 12th century.

But if the original institution is not set down in writing where is it to be found, to this Mr. 1 Bl. replies that it is to be found in the records of Chancery, in judicial decisions in reports, and in the treatises of the learned.

But tho in these records reports &c the law is written yet they are not written as a record or roll of parliament, but these records &c are mere evidence of what the unwritten law is so that they are not law.

Municipal Law.

5

Common Law. —

unruled, but acts of parliament & never can be.

A precedent is a former decision on the point in question, and is only an evidence of what the law is. A judicial decision is not the law but only evidence of what the law is.

Precedents are always to be followed, unless flatly aburd or unjust, I mean in the same ^{1803 370.} ^{1804 493.} country in which they were had.

A precedent is not to be overruled because it cannot be now discovered what were the particular reasons, but he it must be alived by unless proved to be unjust or aburd, have decided.

A rule more bar than this would de-
stroy the whole system of unwritten law.

But if the original institution of the manor & Co is not set down in writing, whence did it originate, since there must have been a time when it did not exist, the & Co was built up by the of justice, it was made & established by the of justice.

How then can it come under the definition of municipal law since the of justice are not the supreme power. To this objection it may be answered, that it is appointed to by the legislative power in such a manner as to imply its sanction.

~~Whatever rules are considered.~~

There are entire branches of unwritten

Municipal Law.

Particular Customs.

Law which have been built up, long since the usual date of immemorial usage that is the accession of H. 1. But these rules and decisions in legal theory are considered as evidence of what the law would have been had those questions arisen at that time.

Particular Customs.

1 Bl 74
2. Do. 263.

Particular customs are local usages, or rules of civil conduct prevailing in certain local limits, and not extending through the whole realm.

It is true in general of particular customs that he who relies on them must plead them specially, and that the ^{evidence of} custom itself as well as the fact itself, must be proved.

1 Bl 70.
1 Bl 70.

2 Bl 363.

Bl 70

As the existence of a custom is a private fact not judicially known to the judges, it is to be tried by a jury. There is an exception to this where its existence has been once tried in the same Ct, where the question arises, tho' the question whether the thing itself be in the custom must be tried.

1 Bl 75.
1 Bl 76.

As the rule that customs must be specially pleaded there is an exception with regard to guilds and a Burrough or English customs, which are considered as judicially known, as well as general customs.

W. J. Bl labels the Law Merchant among particular customs, but it is not a particular

Municipal Law.

Particular Law in particular jurisdiction.
 law custom. A particular custom is one confined
 to a particular district, but the L^m extends
 throughout the state or realm, nor need it be
 pleaded as a particular custom, nor is it ever
 treated as one.

It is now laid down that the law Mer-
 chant is not to be proved by witnesses except
 where new questions arise. But I conceive
 that it is not proper that they should be
 received upon as evidence to the jury, but that
 they should be consulted by the Ct as authori-
 ty. With regard how far witnesses may be con-
 sulted with regard to dubious points in Mer-
 cantile law vide — — —

8 Pl 456.
 1 Do 75.
 2 Do 459
 2 Cr. 481.
 2 Vent 295.
 Chy. & Phil. 18.
 To Reg. 17.
 Lath. 125

Bour 1216
 1222. 1218.
 1 Mol R 298
 4 Cr. 208
 Chy. & Phil 28.

In certain rules with regard to the locali-
 ty of local particular customs, which require certain
 local requisites of which there seven vide Pl 876-78.
 Litt P 212. 9 Cr 56. 1 Inst 114, 13.

109. Dig. 42. 72.
 553.
 September 7th
 # Pl 876. 78
 Litt P 212.

In the construction of particular customs,
 with those which are in derogation of the Ct
 must be construed strictly, that is cases to be
 brought within them must be within the letter
 of the custom, & not brought within them by a
 liberal construction.

9 Cr. 56.
 1 Inst 114.
 Pl 878. 79.

Particular particular Laws.
 or Customs adopted by Cts, within certain
 jurisdiction.

These are the civil & canon laws which

Municipal Law.

Particular Laws.

200 by
 79. 80. 82.
 83.

Adopted in the Ecclesiastical, Military, ^{Maritime} in the
 of the University.

Now these laws are binding on Eng only in consequence of their adoption there.

So far then as they constitute a part of the unwritten law of Eng they are a part of the customary law.

106 79. 80.

The adoption of foreign laws may be by made by immemorial usage in the Cts or by legislative acts, as acts of parliament, &c. &c. The last case they form a part of the law ascribed.

The Civil Laws of Eng so far as they are binding in this country derive their authority here by the same sanction, they are not in themselves binding here as they are the laws of a foreign country. But the Cts of Eng ought not to be expected to accept of our Cts nor are they at liberty to reject it unless it be unjust or altogether inapplicable to our situation, as some parts are. ^{rules} ^{regard} for instance those which have ^{arisen} from the royal prerogative, peerage &c are here wholly unknown.

So long such parts ^{as are inapplicable to us} are of the question I take it the Cts to be as binding in our Cts as well as in Westminster Hall. It is not binding here because it is the Law of Eng: not because it has been adopted and acted upon by our Cts.

English precedents are then to be taken as evidence of the CL in this country, & he who would deny them to be law here, must take upon himself the onus probandi that they are inapplicable to our situation, or flatly unjust or unreasonable. Zucker's Bl 411
429.

There has a question arisen whether there can exist here a CL distinct from that of Eng. That is whether we can supply rules where they are deficient. I observe that so far as any part of the CL of Eng is inapplicable ~~to us~~ we must have a customary or unwritten law of our own, which will apply to our situation.

Customary Law

For without some principles which will apply to every case that may arise in Eng, there must be a deficiency in justice. As no written statute law can ^{be} completely adequate as a remedy in any one single case. For a statute is a positive law which ^{and is confined to the subject upon which it was made.} must be taken strictly, but the CL is a system of ~~common~~ ethics, consisting of connected principles which from analogy can be applied to every case that may arise.

In answer then to the question ~~that~~ ^{whether the Eng CL does not supply rules} whether we can have a com Law: ^{of our own} I answer we must.

So far as the CL of Eng is ~~used~~ ^{used} or ~~is~~ ^{is} ~~not~~ ^{not}, we must have a CL of our own.

Municipal Law.

Can we in this country have a C.L. of our own

But an objection arises that law to be ~~customary~~ or customary must have been existed from the date of legal memory. But this is altogether inapplicable to our country, & it appears perfectly futile to reject those of our own adoption or creation because they are not of that date. The objection is in itself artificial & admits of an ^{an} satisfactory answer. At the time of the creation of the rule the date of legal memory was 60 years, and according to the principle ^{to be used, it is argued that this rule should, sometimes} of it, it should ^{be} general consent & long usage & acquiescence tho' not immemorial according to the arbitrary positive sense annexed to that word by the C.L. is here sufficient to establish a C.L. of our own.

But farther the objection of not being immemorial is absolutely futile and illogical. It answers the question in the negative by giving the question without affirming a reason against it. The question is whether we can have a C.L. of our own they say no because we are not old enough to have a rule immemorial.

We cannot have a rule different, because we cannot is their whole amount of the position.

For they say that we cannot have a C.L. of our own because we can not have it from time immemorial, when the question ^{itself} is whether we cannot change the C.L. or have one of our own. They in fact say we cannot change it because we cannot.

Municipal Law

Les scripta.

A stat is the ^{an} act of the legislature

The ancient Eng. laws are said to be binding in this country as far as the Bill of Eng. that is reman. facie binding. The reason given is that our ancestors on their emigration to this country brought with them all the law then extant in Eng. whose records hold to the same opinion.

And on the other hand, Big game has
not since our colonization are not even found
in the country.

On some of the states the great body of the Eng. stat. law has been adopted down to a certain period, by certain legislative acts.

All states are divisible into two kinds, 1st Vol 85.
public or private, a general or special.

A public stock is one which regards the whole community.

A private ~~stat~~ ^{stat} ~~one~~ that regards par-
ticular persons & private concerns.

This distinction tho' in it's terms very intelligible is not always in it's application.

Most states do indeed regard the whole community that is not any particular parts of the state, nor classes of the community.

Here there is no difficulty in applying the distinction. But in some cases statements relating immediately to a class of individuals are held to be public, while others relating to a par-

Municipal Law.

Public & Private stat^s

Particular class are held to be private.

As to cases of this kind the rule is this. If the class of persons to whom the stat^s applies amounts to a genus as Lo. C. says it is public. If it relates to a class which amounts to a species only it is ~~a~~ private.

4875 a. o. b.
 1875 80.
 4 Mac 639.
 2 Saunders 154.
 30 R. 120.
 1881.

When the class is so general as to admit of subdivisions it is into subordinate classes, the aggregate class is a genus.

But when the class is so limited that it will admit of division only into individuals, and not into subordinate classes it is a species ~~private~~. Thus a stat^s relating to mechanics is a public stat^s, but a stat^s relating to shoe-makers carpenters &c it is private.

2 C. 44.
 8 D. 24. 125
 Holt 227.

Sham 429
 2 Mac 620

And in every stat^s which relates to the king is public, ^{as to the king or something} being one of the heads of the body politic. And on the same principle a stat^s giving a forfeiture to the king or state is public tho relating to a particular species.

And also every stat^s concerning the public revenue is a public stat^s.

Mac 58.
 10 C 57
 12 M. 249.
 613.

A stat^s that every shoemaker should use a certain leather and no other & go no farther, it would be a private stat^s, but if it should say upon the penalty of forfeiting a certain sum to the king or treasure, this invasion of a public claim would make it a public stat^s.

Penal & Beneficial Statutes

A total may be in some of it' provisions public, $\frac{1}{2}$ Bac 640
and in others private

All states may be divided again into such as are declaratory of the C. L., and such as are remedial of the defects of the C. L.

Declaratory stats are such as declare what the PL is & what it always has been, the PL in legal theory being deemed to have been always what it now is.

There is a certain class of states which are declaratory of former states. These are not properly declaratory of the C^o but of a prior state law.

introduce. The medical starts on the other hand
~~suppose~~ some new rules varying from the old
supplying its deficiencies or abridging its
superfluities.

~~It is~~ Our stat^s declaring the tenure of
land, here to be allodial is a declaratory stat tho' it
involves an absurdity. So also the stats 13. 22y Eliz so
far as they act upon fraudulent conveyances are de-
claratory. But stats of limitation & most of our stats
are remedial.

All states inflicting a penalty or punishment of any kind are called penal, states not inflicting any penalty or punishment are called remedial or beneficial.

A penal stat then is one which inflicts an
punishment, to which penalty is synonymous, in it.

Municipal Law

Penal & beneficial stats.

Br J 416.
17 R 259.

most extensive application. signification

Salk 212.
Ex. Dr. actn
Post A. 1.
10 R 125.
Br J 414.

In strictness all stats giving higher remedies than the rules of natural justice require seem to be in the nature of penal stats, or stats giving double damages. But such are not called penal stats, tho' they may operate penal.

Salk 371.
Garth 119.22
Rae 511
4 Do 681
Salk 205
2 Inst 7
Combe 1702
Hendry 587.

But stats giving costs of suit are holden to be penal. Costs were not known at E.L., nor would any now be recovered had they not been introduced by stat, in lieu of the ancient amercement which was in the nature of a penalty. Costs were first introduced by 6 Edwards first: and are substitutes for the ancient amercements.

Strong 100
1 Mac 511
4 Do 681
Salk 205
Low 382.
291.
26 R 452.
7 Do 257.
10 R 125.

"An action brought by an individual, to recover a penalty, in his own right imposed by a stat, is not a penal action - tho' the statute is clearly penal. the usual form of the action is debt.

Stats in regard to their phraseology are either affirmative or negative. This distinction is an useless one & the rules of construction, which are predicated on it are arbitrary & unmeaning.

Post 111. 222.
306.
2 R 371.

Every stat commences it's operation from the first day of that session of parliament in which it is enacted, unless some other day is mentioned for it's commencement. For the whole period of the session of parliament as of a Ct of Justice is regarded but as one day. Hence it will appear that they will affect rights, which were in existence, months before the stat in point of fact, tho' not in legal

Municipal Law.

15

Time when state begins to operate.
they were enacted.

Of two states enacted in the same session & on the same subject, no time being fixed for their commencement, it is said neither has the priority. If they were a true rule, & there was a repugnance in the states each would repeal pro tanto the other. But the better opinion seems to be, that the one last made in point of fact, shall repeal the other as far as the repugnance extends.

4 Pac 630.

698.

6 Mod 287.

The general rule of the Eng Law that a stat commences its operation from the day of the session has been exploded in Con: on the ground that such acts may have a retroactive operation. It seems not to be definitely ascertained.

vide
1 McC 870 nts

By construction is meant the process by which the reasoning of language is ascertained. This is the object of all the rules laid down in regard to the construction of stats.

Construction

Three points are principally to be considered.
1st the old law. 2^d the mischief. 3^d the remedy.

If it can first be ascertained what the old law was, the object of the new will be more easily discovered, & in this the inquirer will still further be aided by discovering the mischief - which he should so construe the stat as to suppress, and advance the remedy. By a consideration of these the remedy may generally be discovered, & this is always the object of primary enquiry.

188 27.

Municipal Law.

Construction of Stats.

The rules above laid down with respect to the interpretation of laws, in general, are to be observed also in the construction of stats.

It is a rule of the PL that penal stats are to be construed strictly i.e. that according to the letter.

The rigor of the ancient proceedings under that rule has been somewhat relaxed in modern times.

The meaning of the rule is that penal stats are to be construed strictly as against the subject but liberally for him.

Under the first branch of this stat then a person shall not be adjudged to be within the operation of the stat, unless he is within the letter of it.

And under the second branch, a person tho' within the letter of the stat, shall not be adjudged to come under its operation, unless he is also within the reason & spirit of it. The person accused is not punishable unless he is both within the letter & spirit of the law.

In general any universality of expression in a stat does not include (unless there are names) those who by reason of legal incapacity are exempted from favor of a similar nature & operation. Thus infants have been determined not to be within the stat of forcible entry and detainer which inflicts corporal punishment.

These rules are all founded on the benignity with which judges have construed penal stats.

1 Mol 35.

2 B. 9. 8.

8 Mod 68.

Hous 17.

Each C.L. 1. 7. 2.
295.Each 229.
210. 239.

Each.

50 984.

4th 183.

1 Branch 32. 61.

139. 191. 110.

Closed 455.

4 Dec 649.

1 Branch Pl

64. 35.

19 Dec 561.

Municipal Law

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Construction of stats.

The intention of the legislature is not to be disregarded in construing the stat against the subject.

The truth is the intention ought always to govern, when apparent, & that benign mode of construction is I. N. S. is nothing more or less than an evasion of the law. The will of the legislature when discovered is law.

The rule of strict construction as against the subject has not been uniformly observed, & was not even in ancient times. This is illustrated by the decision in the case of a servant who was made guilty of Petit Treason for killing his master & wife. Plowd 80. Co. Lk 71.

If the repetition of an offence, incurs an increased punishment, the offender is not subject to the increased punishment, unless he has before the commission of the second been convicted of the first offence. This is another instance of the benign construction of the St. The first punishment say the judges was intended as a wholesome discipline, & the offender ought not to incur the increased punishment, till he has had the benefit of this discipline. Plowd 168. Hale 326. 5 Co. 685. Walst-249.

It has been holden in Com that where a penalty has been repeatedly increased by the continuance of the offence (as of a nuisance) only one penalty can be used at a time. If the penalty is \$50 per month the prosecutor cannot at the end of two months recover \$200, he must at the end of each month recover what has then been incurred. Root-12.52. 2 Bro 289.

Municipal Law

Construction of state.

Mich. R. 57.

This rule is different from that of the Eng. law. The penal laws of one country a sovereign state cannot be enforced in another, or noticed so as to affect the rights of the citizens in another.

Cal. R. 19.

186. Cal. 123.

Cal. R. 193.

Cal. R. 1619 5732

Criminal laws are strictly local. No one can be punished in Cal. for an offence committed in N.Y. The remedy belongs to that state whose laws are violated, and against which the offence was committed.

And on the same principle it is that there is no common jurisdiction in this respect between the states of the United States.

On this ground it is that those con. law

U.S. v. Hudson. Prosecutions, which have been instituted in the U.S. for offences (as libels against the President of the U.S.) which are cognizable under the laws of the states have been abated.

And on the same principle, notwithstanding a train of decisions in Mass: & Court I apprehend that a person committing theft in one state, & carrying the goods into another is not punishable in the latter. There is no analogy between this case & that where a man steals goods in one county, & is punished in another, where he was taken with the property stolen. For both countries are under one sovereign jurisdiction, & therefore the offence is continually committed by the felon wherever he goes. But in the other case it is not in the power of the judges of one

Municipal Law.

Penal law of one state not noticed in another. State, to adopt the same reasoning, with regard to a theft committed in another; for as judges they cannot know that the fact of taking the property was theft in the State where the property was taken, & then of course they cannot say that he is guilty of a repetition of the offence.

But the doctrine established in these decisions, viewed in other points of light, is in the highest degree absurd & unjust. Suppose for example by ^{the} law of Mass. theft was punished only by a pecuniary penalty, and that in Court the punishment was death. Now under these decisions, if a man steals property in Mass: & is taken with it in Court, here he must be subjected to capital punishment for an offence which when committed subjected him only to a pecuniary penalty.

Again if these decisions are correct it cannot be claimed that a conviction & punishment for the offence in one State, will bar a prosecution in another. So that if a man were to steal a horse in Mass and in order to effect his escape has travelled thro' the Union he has become liable to conviction & punishment not once only for his offence according to the enlightened principles of the English law (at our own) but in every State thro' which he passes, untill perhaps he is arrested in his career under some law more severe than the rest, by the hand of the public executioner!!!

Municipal Law.

Penal law of one state not noticed in another.
 In a case which arose some years ago in
 Circuit Court of the United States this doctrine was
 denied by Judge Le & Patterson notwithstanding all
 the decisions in our State Courts to support it,
 & I trust that if the question could be brought
 before the Supreme Ct of the State the former decis-
 ions would be overruled.

Statutes.

Remedial or beneficial statutes are to be liberally, September 10, 1851
 or equitably expounded. So that it's liberal meaning 3 Bl. C. 430.2
 may be enlarged or restrained to answer the pur- 421.3
 pose of the legislature. cases without the letter maybe within the spirit. 16. 123. - 3
 it; 3 Do 71
 An act or transaction declared by stat to be void. 36 C. 405
 is often in the construction of the stat, H. on D. 140-1.
 adjudged by Cts of Justice to be only voidable. If the Dec. 300.
 mischief intended to be avoided by the stat would 130 87.
 be let in by construing the stat voidable, the 36. 52 60.2
 Cts will construe the stat as making it abso- 10 Do 59.7
 lutely void. But if the mischief would not ensue 22. R 600.2
 it may be construed as making the transact- Do 710, 340
 ion voidable. And there is a very great differ- 2 R. R. 413.
 ence between a thing strictly void & one voidable. Cro 2. 141. 207
 Thus a transaction merely voidable may be 2 R. R. 413.
 afterwards ratified by the parties but one strictly Cro 2. 141. 207
 void cannot be.

When the terms of the stat ^{merely} enable the 2 Hawk. 263.2
 Cts to do a matter of justice to a party, the 394. 395.5
 Cts are bound to do it. These enabling words as Str. 1131.
 "may" are construed as imperative in such cases. 5 C. R. 538.
4 Bac. 544.

This does not hold universally of all authorities
 given by parliament, but only ⁱⁿ those cases, where
 a person claims a matter of justice.

A stat taking away a Cts remedy is to no Mod 282.
 be construed strictly, & not extended in it's con- 4 Mac 530.
 struction. Thus the stats of limitations with re- 1 Salt 421
 gard to actions must be construed strictly.

Municipal Law.

Repeal.

The words of an explanatory stat are always to be construed strictly, as it's very object is to put all questions as to the construction of it at rest. And to admit of liberal constructions would, be to have no end of construction.

Words 57. 58. 9. Stat's partly penal & partly remedial are to be construed strictly, as to the penal, and liberally as to the remedial part.

1 B. 4.
1 Bl. 89.

The different parts of a stat are to be so construed if possible that the whole act may stand together and take effect. And where two parts are apparently repugnant they should be construed so as to make them stand together. But where there is a saving in a stat totally repugnant to the body of the stat, that saving is void.

The rules by which stats are construed are the same in equity as at Law. The remedy or relief is generally different. It is true that Stat's & a Law sometime differ, but one of them must be wrong in such cases, as they both acknowledge the same rules of construction.

Repeal of Law.

It is a rule that all laws written or unwritten are repealable. And where there is a repugnance between an old and new Law the former is repealed by the latter as far as this repugnance extends. So that when the O.L. & the Stat Law are repugnant the O.L.

Municipal Law.

Repeal

is ~~not~~ ^{not} far repealed. And so also of acts, the last 1 Inst. 111. 115.
being taken to be the will of the Legislature. 6 Mod. 87.
11 C. 65

And in pursuance of this principle in 4 Bac 638 }
is a rule that if the latter part of a stat is re- 1 Bk 89.
pealed to a former, the former is repealed pro
tanto. the latter is the last expression of the will of the Legislature;

It being a fundamental maxim that 1 Bl. 90.
every law is repealable, it follows that a clause 4 Bac 638.
in a stat that it never shall be repealed is
void, it being in derogation of the power
of future legislatures, they who make, can repeal {see appendix;

The law does not however ^{by effect} ^{11 C. 63.}
repeal by implication, to have a repeal the 10. Mod. 118.
repugnancy in the later law should be clear.

If there is such a repugnancy as cannot be
overcome, it must operate as a repeal of the
former law.

It is said that an affirmative stat ^{1 Bac. 641}
does not repeal the O.L. This rule is not true ^{for the rule}
it may, or may not abrogate the O.L. ^{inde}
It always, ^{1 Inst. 111. 115.}
does repeal the O.L. if it is repugnant. The rule ^{1 Bk 89. Section}
is negative. ^{Sec. 205}

Where a stat gives a remedy in a case 2 Burr 803.
different from what there was at O.L., and the 805
stat does not abrogate the O.L. there will ^{Running on}
be two concurrent remedies. And that of the 9th.
stat is called accumulative, or additional. In Con. Lc
stances of this sort are numerous.

Municipal Law

Repeal.

Leach & Co. 252.

4 Nov. 2226

4 Dec. 624

If a stat affixes a higher or lower punishment for a given offence than an older stat, the older stat is repealed.

4 Nov 2020.

2 Shaw 30.

10 Met 339.

4 Blk 158.

And if a penal stat affixes a lower punishment than was inflicted by the C & L the C & L rule is abrogated. I do not find however in any of our books that if the stat affixes a higher penalty, that the C & L is repealed. I believe it to be the practice to prosecute either at C & L or by the stat. & the Stat is accumulative.

2 Shaw 30.

It is said also that an affirmative stat does not repeal a former affirmative stat. This is also absurd, for if repugnant to the former it will repeal it.

4 D K 3.

Blond 242

11 B 97

1 Blk 39

That repugnancy or not is the criterion see these authorities.

The distinctions that I have mentioned respecting the repealing operation of stats, are not intended to apply to express clauses of repeal for ^{in those cases} ~~there~~ can be no construction in the case.

4 Mac 538.

1 Blk 90.

If a repealing stat is itself repealed, the original stat which was first repealed is revived.

4 Mac 536.

And on the other hand if a stat which has been repealed is revived, the repealing stat is itself repealed.

Municipal Law.

Effect of statute on covenants.

Salk 197
 Van S. 442-5
 5 S. R. 267
 { 2d Ra 811 221.
 2d 252
 3 Had 57. 242.

invariable by a subsequent stat, the covenant is annulled, for it cannot be carried into effect without opposing the law. This is not one of those which is called strictly ^{instance of} retroactive effect.

Salk 198

And on the other hand if one covenants to not to do an act, which he had a right at the time to covenant against, but by a subsequent stat it ^{becomes} his duty to do it, the covenant is annulled. In these cases the annulling the contract is not the object of the stat, but an consequence, and may not strictly come under the head of retroactive effects.

Salk 199

If one covenants however not to do an unlawful act, a subsequent stat making the act lawful does not annul the covenant, for here the ^{stat} does not make it the duty of the covenantor to do the act, but merely makes the act lawful.

1 H. Vol. 65

If a contract declared illegal by stat, which is made while the stat is in force, a subsequent repeal of the stat does not make the contract valid, it will still remain void, being so ab initio.

Statutes.

If complete performance of the contract is made unlawful by a subsequent stat, but in part he performs consistently with the stat, that part must be performed according to the statute, *sc. pres.*

The constitution of the U. S. prohibits ex post facto laws, & all laws impairing the obligation of contracts, i.e. depriving a party of his remedy.

It may be asked whether some of the acts of the U. S. before mentioned are not inconsistent with this provision. I think not as the prohibition of a future act, altho' it may consequently affect a previous contract, does not appear to be within that article. It is different from a rule declaring all contracts made to be void absolutely, for this is not made for the purpose of rendering those contracts void, but affects it accidentally & consequentially.

A stat requiring what is impossible is void of no validity.

It is said in some of the old books that a stat contrary to reason or the divine law is void. This I conceive to be a proposition wholly indefensible. I know of no principle upon which U. S. of Justice can declare an act of the legislator void. This would be to render the judiciary the supreme power, as every citizen would be at the discretion of the judge.

September 11
 Plowd 284.
 2 Pl. Bl 581.
 103.
 1 Doubtless 2096
 2115
 2 Pl. Bl 254
 2 Pl. Bl 211
 Article 1. Sec 10
 1 Pl. Bl. 448, 450

8 Pl. Bl.

Stat 87. 88.

1 Pl. Bl 41. 42.

1 Doubtless 209

Municipal Law

Statute

It has been a question whether courts appose
to a written constitution is void. I do not know
how any question could have arisen, as the consti-
tution is paramount to all other laws. But it has
been a question whether Cts of Justice are to de-
cide whether it be contrary ^{to the constitution} or not, they undoubtedly
are, they are the legal expounders of the law.

the
Federalist
vol 2. page
295.

The Constitution is part of the municipal
law, & paramount to stat law, & Cts of Justice
must decide with respect to the competence
of stats with the constitution, or not, ^{well or with regard to} are another.

It is now settled that it is competent
for Cts of Justice to decide of the constitutionality of stat. ^{the consti.}
of a stat makes a new law concerning
an old particular offence, & appoints certain
judges to execute it, still the jurisdiction of
the ordinary Cts of jurisdiction is not excluded.
Merely. The creation of a new jurisdiction does
not annul the former.

And so also if a stat provides that
all crimes of a certain nature shall be tried by
certain judges still the jurisdiction of those Cts
which before had cognizance of those crimes
will retain ^{the} same as before.

1 March 8.9
114.
9 B. 118
Lark 582.
Dare 1842

The reason is that the ancient
and established jurisdiction of a Ct is not
to be ousted by implication. But if a stat
creates a new offence, and establishes a Ct new

Municipal Law

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jurisdiction for it, the better opinion seems to be that it will be subject to that new jurisdiction only.

There are some distinctions to be observed with regard to authorities & powers conferred by stat.

If a stat confers an authority or power upon any person, affecting the property of individuals that authority must be strictly pursued, and it must appear upon the face of the proceedings to have been thus strictly observed & pursued, or the whole proceeding must be void.

If a stat confers authority upon a body of men, giving them power to act by vote of a majority & constitutes a certain number of that body a quorum, it has been a question whether an act by the majority of the quorum, but not of the whole, would be binding. It seems to be the better opinion that the act of such a quorum does not bind, the rest.

If an authority of a private nature is conferred by stat upon two or more persons, the authority is joint & not several unless otherwise expressed, & consequently will not survive after the death of either of them.

All must concur in the act, or it will not bind.

2 Bac 302
18 Barb 9.
10 Barb 193
2 H. R. 643.
Cr. J. 543.
Calif 524
Camp 26.
2 Bac 642.
10 B. 50.
Holt 211.
5 D. R. 593.
Do. 810.
822

Municipal Law.

Reading stats.

Mr 114.

1 Mr 181.

4 Mac 409 abt.

442.

But if the authority is of a public nature it is several & will therefore survive; the persons thus enabled become officers, & the authority is several as well as joint.

Again where the power thus conferred

of a public nature the act of the majority all being present, is the act of all. If one dies the act of those who remain is valid, but if one is not present, but living the act will not be binding.

In the case of corporations the rule is somewhat different; the majority of the corporation present however small the number may bind the whole, unless there be some express provision respecting it, this rule presupposes that all have been legally summoned.

Of Reading Stats & the mode of prosecuting them.

for the purpose

3 Co Re 11. 221.

To plead a stat is needed to state facts which bring the case within it.

Quoting upon a stat consists in an express reference to it, citing former statutes, or verbatim.

Reciting a stat consists merely in quoting it's contents, & is distinct from the two former.

Sometimes stats are pleaded by reciting them, & is necessary in those of a private nature

Municipal Law

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Pleading stats.

The first general rule of pleading is that we are bound to take notice of a public stat 14885
ex officio, so that it need not be set out in the bill 200
14885. of a private stat a judge cannot take notice of a unless it be specially pleaded, 106. 57.
1 Mac 58. it is not presumed official to know it, it must be set out that is shown upon the record. 2 Mac 446.

In law however a private as well as a public stat may be given by way of evidence under the general issue, without pleading it. 342
But if an action is to be founded upon a private stat, it must be pleaded & set forth.

A public stat when required to be pleaded never need be recited, it is recognized. 1 Mac 58.
times to plead a public stat, but never to recite it or provisions as the judge is to presume to know them, as part of the general law. 2 East 241.
Hawkins 875. L. 110

But in case of a private stat the case is different; it must be recited as well as pleaded. 1 Mac 58.
2 East 241.
108 57.
2 Mac 655.

* when the action is founded on the public st. it must be pleaded

Municipal Law.

Pleading Stats.

September 18th

Br. Blz 245

Comp 236.

2d Ka 382

2 Mai 99

Br. Blz 246.

186. 659.

1st Nat. 516

Langley 92

The misrecital of a public stat is in some cases fatal even after verdict. It is never necessary for a party to recite it but if he will bind himself to recite it in many cases it will prove fatal, but it is said that this is not the case if the misrecital is in an immaterial part.

The true rule seems to be that the misrecital of a public stat is not fatal unless the party pleading it ties himself up to the stat as recited by words of reference or the words of the statute.

If he makes use of words of reference to the stat, he binds himself so that a misrecital will prove fatal.

2d Ka 382

Greenman 211

2 Macknally

516.

May 90

But if a party misrecites a stat and concludes by the st. virtue of the stat generally, the Ct will ex officio take notice of the proper construction of the stat.

On the other hand the misrecital is not nor cannot be fatal after a verdict or a demurrer, for the judges do not know it officially. They are bound to decide upon the stat as pleaded unless the opposite party take advantage of the misrecital by pleading, or even after recite it truly in the record & then demur.

2 Mac- 514

2d Ka 382.

1st Nat. 516.

2d Nat. 241.

But even a public stat when to be used for the purpose of defeating a specialty, must be specially pleaded.

Municipal Law.

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Pleading Stats.

That is the party must plead the facts which
bury the case within the stat, and not de-
pend upon it in the general issue. The
reason is that the stat would not support
the general issue.

Wm. H. H. 540.

This however not the rule in Lon
the dft may rely upon the stat in the gen-
eral issue, that diversity from the C.L. is
created by stat. I believe there is one somewhat
similar in N.Y.

In declaring upon private stat, it is
necessary to recite them substantially, tho
it is not ^{then} necessary to recite them ver-
bim, but ~~its~~ contents must be recited.

It is never necessary to recite the
title of any stat, public or private. The rea-
son is that neither the preamble nor title
is any part of the law. It being unnecessary
to recite the title, it was once held that
the recital of the title was mere
surplusage and of no effect, but now it
is said that it is fatal.

In any the recital of a stat when
necessary must contain the date of the
act, the place where ^{enacted}, otherwise it is all
an error. I have never known
any case in our practice in which the

Municipal Law.

Pleading Stats.

place has been mentioned

Whenever a private stat is pleaded the opposite party may plead nul tuel reco^{is} but, such a plea as to a public stat^{is not true} for here the judges are to know ex officio its existence.

It is a general rule that in declaring upon public stats, it is not necessary to count upon them.

To this rule there ^{are} certain exceptions. 1st If there are two concurrent remedies one at C L, & one by the stat, the Court rules upon the stat, must count upon it. —

2^d — In actions on penal stats it is necessary for the prosecutor to count upon it tho' a public one. I find no reason either for this or believe there is none, it is now necessary because it has been long practised, 3^d If a public stat gives a new action; not known at C L, it is necessary to count upon it. The rule copied in the books is that it must be recited, but that is erroneous.

* There are the three exceptions to the general rule. * But when a stat extends an old remedy to a new case, it is not necessary in pleading the stat, to count upon it.

4 B. 70.

2 M. 57.

8 & 28.

C. L. 355.

Bac 38.

C. L. 601.

C. L. 352.

Com Dig action
on stat C.

4 Bac 18.

2 Hawk 356-7.

Plowd 200.

1 M. 103.

H. 32.

7 M. 521.

2 C. L. 355.

C. L. 126.

4 Bac 656.

10 M. 504.

Talk 505.

Holt 624.

2 C. L. 359:4

Com Dig action
on stat C.

4 B. 80. 85.

1 Com Dig action
on stat C.

4 Bac 439. 445.

Municipal Law.

Reading Stats.

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It will follow from these distinctions that in actions on public stats not penal, & where there is no new action given by the stat, & no C.L. remedy, it is not necessary to count upon them.

If then a stat creates a right or duty and gives damages for a violation of the one or neglect of the other, there is no need to count upon it. For as it gives damages ^{only} it is not penal, nor is there any new action & there is no C.L. remedy.

The rule is the same where ~~the~~ ^a stat ^{not penal} creates a right or a duty & does not give any remedy but leaves it to the C.L. to enforce its provisions. Salk 212
Barth 282.
Salk 212.

If one stat prohibits an act and another inflicts the penalty both are to be counted upon, in case of penal stats. Hould 200
2 Bar 333.
4. See 650

An offence may be laid as one in indictment to be both against the Com: & stat. law, but this must be in two counts: Leach B. & C. 235.

Where part of a trespass ^{consisting of connected actions} is against the C.L. & part against the stat, the ^{counting} words contra formam statuti are to be referred to the latter part only. Salk 212.
Barth 282.

If a temporary public stat having expired is continued by a subsequent one, & the

Municipal Law.

Reading State.

case is one which requires counting upon the law, counting upon the former only, is sufficient. For that & that only contains the law & the latter merely contains the exception of the former. The first therefore must be counted upon.

If in a prosecution for that which is an offence only at C.L., in the indictment, a stat should be by mistake counted upon, such counting words will be rejected as surplusage. — But I do not think that it would be rejected as surplusage upon special demand, tho it would in a general one.

An important rule in prosecuting on public stats is that exceptions in the enacting clause must be negative, and the amplifier of this is such an incurable defect that nothing can aid it. The reason ^{is an exception founded upon it} which is made complete by the exception is that the clause containing a description of the offence, & therefore the exceptions must be negative.

But exceptions in a distinct clause need not be ~~in the~~ negative. For here the exceptions constitute no part of the description of the offence.

to 1085
to 656
658

{ 2 Bouch
Chap 25
Lech 115. 116.
3 R. 162
1 R. 362. 363

152.
1 R. 121.
2 R. 85.
3 R. 27.
4 R. 322.
5 R. 339.
1 East 626.
2 R. 65
3 R. 120
4 R. 54.

Municipal Law.

Pleading statutes.

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When there are two concurrent remedies September 14th
one at C.L. & one by stat either may be pursued. And 2 Hawk
cases of this kind over are very numerous. — 302 Mts.
Leach C.L. 233.
2 Burr 799. 800.
803. 805.
Camp 648.

Thus in these cases, if the plf in his suit
at C.L. by the stat cannot support his case un- Moore 750
der the stat; in the same suit he may resort 2 Bl R. 900
to the C.L., if he can support his action at the
C.L. & the words contra fornicam statuti will
be rejected as surplusage.

The same rule holds in public prosecu-
tion, & civil also.

Of that which was no offence at C.L.
made ^{illegal} ~~one~~ by a stat, & a particular mode
of prosecuting it is pointed out by the stat
it is said that that mode alone can be per-
sued; but this rule as hereafter will be shown
requires some qualification.

This rule holds only in two classes of
cases, but these classes include most cases

1st When the particular mode of prosecuting
is prescribed in the prohibitory or enacting clause 1 Burr 544.5
4 B. R. 205.
2 Hawk 302 Mts.
2 Burr 803.
- 805.

2 When there is no prohibitory clause, as
when the stat says "a person acting thus shall
pay such a fine, ^{to be recovered by} upon information," here is no
prohibition clause.

But on the other hand when the particu-
lar mode of prosecuting is prescribed, in a
penal substantive clause, the rule does

Municipal Law.

1. 205.
2 Hawk 302

Reading stat.

not apply, & any proper C.L. remedy may be pursued.

There is much confusion in cases on this subject. The only reason for this diversity that I can see is that in the former class of cases the offence & remedy are so blended that they cannot be separated. But in the other the offence being in one clause & the mode of prosecuting in another, they are separate.

2 Bouv 803.
- 305. 804.
2 Hawk 302.
4 B. N. 202

These rules apply where the stat. makes that illegal which was not so at C.L. But on the other hand if that which is prohibited by stat. was an offence at C.L., the C.L. remedy may be pursued, although the mode of prosecuting be founded out in the prohibition or enacting clause, for here there is a remedy independent of the stat., which has merely provided another without taking away that which existed before.

1 Bouv 344
C. C. 655.
10 C. 45.
3 Lev. 290.
4 Bac 653.
Doug. 425.

If a stat. creates an offence, and gives no remedy or sanction the C.L. will lend it's aid & punish the offender for a misdemeanour. The rule is the same where the stat. creates a right, the C.L. will enforce it.

It is said in some of these authorities that the ^{remedy} must be sued as by an action on the stat. But I have said that it must be pursued at C.L., the right given by the stat., but the remedy must be at C.L.

Who may prosecute on penal statute.

To obstruct the execution of farmers grant
It is an offence at O.L., & the indict- Day 425.
ment in such case need not & ought not count
upon the stat., the action is not founded on
the statute, which merely confers the right
which is obstructed.

Who may prosecute on penal statute.

It is a general principle of the O.L. that
a public offence or such cannot be prose- 4 Bl 2. 5-7.
cuted by a private individual in his 2 Hawk 268.
own private capacity. It is true that almost 377 n. octavo.
all cases of public offence, some private in-
jury is suffered, & in those cases the injured
person may sue for the private injury.

In England private individuals do ^{for example} 2 B.R. 247
prosecute public offenders in the King's name, 198. 190.
this is no part of the ~~remedy~~ penalty will Leach 192.
accrue to him, the whole interest that he 229. 198.
has is the recovery of costs. Indeed in England for example
private persons prosecute thus even in capital 251. 257.
cases, as those of felony. 252. 257.
3 Bac 558
2 B.R. 158
205.

This practice is however wholly un-
known in England, no one can prosecute for the
state as a private individual.

There is however a species of mixed
prosecution partly private & partly public
called a qui tam, it is one that is
brought partly for the state, for & partly at
the inst of the individual prosecuting.

Municipal Law.

Qui tam and popular actions.

It is called a *qui tam* prosecution from

1 Mac 27.
2 Bl 182.
Com. Dy. actn
an stat. C. 1.
4 Bl. 588.
2 Hawk 262.
Folio

The Latin words used in the process

These prosecutions are either by action or information. The difference is that a *qui tam* action is carried on by civil & a *qui tam* information by a criminal process.

3 Bl 161. 2.
4 Do 368.

Qui tam complaints when accompanied with a forthwith process are like informations & are therefore criminal prosecutions. On the other hand, *qui tam* process commenced on a civil prosecution, is a *qui tam* action.

11 Bl 125.
Courg 582.
3 Bl R. 245.
4 Do. 755.-8.
7 Do. 257.
Kerly 179

An action brought by an individual in his own right tho' on a penal stat is a civil suit. This has important consequences

4 Bl 368
1 Mac 27.
2 Hawk. 377.
Cr. Eliz. 377.
Cr. J. 560.
3d 52.-5. -

Prosecutions *qui tam* are generally on penal stats to recover ^{some} penalty or forfeiture & are generally treated & considered as mere creatures of penal stats, they were not however ~~ever~~ unknown at C. J., tho' such cases were very rare.

3 Bl 160.
2 Do 437.

A popular action is one giving to any person who will sue for the penalty incurred by the violation of the ^{penal} stat.

Com. Dy. action
an stat C. 1.
3 Bl 161-2
2 Hawk 205.
Folio

Sometimes the whole penalty is given to the prosecutor & sometimes a part only but in either case the action being given to any person who will sue, is a popular action.

Municipal Law

Qui tam and popular action.

A popular action may then not be a qui tam for the whole penalty may belong to the prosecutor. And a qui tam may not be a popular one as the right of prosecuting may be confined as it often is to the party injured.

If an individual is civilly injured by an offence prohibited by stat, he may have his private remedy by an action on the stat.

10 B. 75 b.

Com Dy action.

on stat. A. 1.

4 Mac 653.

And whenever a stat prohibits or commands, any thing for the advantage of individuals the individual injured, may have his remedy upon it tho' the action stat is merely penal, & no specific remedy given him by it.

6 Mod. 263.

2 Hawk 577.

Com Dy action.

on stat.

4 Mac 653.

When a stat inflicts a penalty upon any one for the doing of another of his right or interest & does not appropriate the penalty the penalty belongs to the injured party, & may move an action at C. L. to recover it.

5 Lev 290.

Com Dy action.

on stat.

1 Inst 159.

As to the question in what cases a qui tam prosecution will lie, there are several distinctions

If for an offence immediately injurious to the public only, the stat gives the penalty or part of it to him who will prosecute for the offence any person may point for it, in a qui tam action

Municipal Law

Qui tam prosecutions &c.

In a case of *qui tam* where the whole penalty is given, there is no propriety in saying the action ^{ought to be} *qui tam*. But it ^{may} be so however in many cases.

4 B. 10.

2 Hawk.

377.

Com. Dy. act
on 10. C. 1. 3.

The rule is the same where a fine is inflicted, to be given to the King a share and a certain sum to the prosecutor, the action is a *qui tam* for here in these cases one has a right to prosecute, for by commencing the prosecution he acquires an interest in the penalty to be received by him.

2 Hawk. 377.

1 Mac. 27.

But in cases where the offence is injurious to the public only, no one can prosecute as an individual, unless some sum or penalty is given to him for prosecuting the offender, for he has no interest in it.

But on the other hand if the stat prohibits an offence immediately injurious to an individual as well as the public & gives him a penalty, part of, it or damages, or even tho' the stat gives him no remedy at all, it is said that he may and ought to bring a *qui tam* action; for he has an interest in the prosecution for he may be interested in the penalty or damages, & if more ^{or partly} are given by the stat, he has impliedly a right to recover them.

1 Mac 27.

4 B. 10.

12 B. 132.

6 Cr. 9. 132.

3 B. 161

Municipal Law.

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Qui tam prosecutions

I do not see the propriety however of bringing a qui tam action where the whole penalty is recovered by the party injured, or where damages are awarded to him & no penalty forfeited to the king.

The Rule is said to be the same, tho no penalty, or other remedy, is expressly given to the party grieved.

If a penal stat expressly allots the penalty to the party grieved by the offence, he may have an action on the stat, without joining the king or public. September 15th
1 Com. De acta
stat 2.

Generally, where a fine is given to the public and a civil remedy to the party ^{injured} grieved by an offence the fine is inflicted of course on conviction on the civil action; as at O.L. whenever a dft was convicted of a trespass or a capital pro fine was aimed against him. 4 Mas 11. 663.
5 D'91. 198.
2 B & 506.
Callh 636.
Barth 390.

We have several stats of this nature - as against defamation, breach of peace & malicious prosecution &c. This practice has not been adopted here, unless the plf in the action moves for the infliction of the fine. Actions for these causes are usually brought at O.L.

When no form of action is prescribed for the recovery of a penalty imposed by stat, the appropriate action is debt. This sounds in contract, between the plff & dft, where in fact there

Municipal Law.

Actions on local statutes.

O'Brien

was nothing like a contract. The reasoning is this—by the commencement of the prosecution the plff becomes entitled to a penalty—he is therefore a debtor, or, & hence this form of action is deemed proper. It seems questionable then, whether upon strict principles indebitatus assumpsit would not lie for it is a general rule that indeb. ass. will lie where debt will.

2 Lev 232.

Barth 92.

Exp. 10. y.

Indebitatus assumpsit has been holden in Eng. to lie to recover a fine imposed by a corporation. In Lon: this action has been sustained to recover a penalty.

3 Bl 162.

2 Hawk 392.

11 C. 2. 636.

7 D. R. 335.

If a penalty is given by stat. partly to the king, & partly to the prosecutor, the king may prosecute & recover the whole. The reason is that the part allotted to the prosecutor, is given merely as an inducement to individuals to prosecute for the king—a not as an indemnity for any injury; but the king is here prosecutor himself.

2 Hawk 278

393.

3 Bl. 262.

11 Co. 65: 66.

Co. L. 480:2

Co. Digest Sec. 1

a Retul. 2. 2.

A bona fide conviction on a given prosecution, either by action or information, is a bar to another prosecution of the same sort, or even to a public prosecution, for it is a maxim, that no man is twice liable to conviction for the same offence.

And on the other hand, a bona fide acquittal is a bar in the same manner, to a subsequent indictment or prosecution. This acquittal proceeds on

Actions on penal stats.

the ground of estoppel. The verdict is conclusive evidence that the party ^{last} acquitted is not guilty. If the conviction or acquittal was by collusion it will be of no avail.

If a conviction or acquittal on a prosecution purely public is a bar to a qui tam prosecution for the same offence.

It is incorrectly said in our books that shall 29, 104. }
the pendency of a qui tam prosecution is pleadable ^{1 Mac 41.} in bar of a subsequent prosecution. It is pleadable ^{2 Bl. 261.} in abatement, but not in bar. This is in a- ^{2 Hawk 209.} ^{3 Burr 14, 20.} ^{2 Hawk 291.} ^{ch 26, § 63.} ^{correctly laid down} ^{line rule.} analogy to the rule in civil actions, conviction or acquittal are pleadable in bar.

A person claiming a penalty, a sum of money under a penal stat, which gives the penalty to the prosecutor has no right to it, till he commences prosecution, that gives him an inchoate right to it. As to a right given by a ^{not penal} ^{penal} ^{beneficial} stat the rule is otherwise. There the party injured has an immediate right, upon the commission of the wrong. The damages are in the nature of a recompense.

In the case of penal stats however, giving the penalty to any one who shall prosecute, he who commences the prosecution acquires by that act an inchoate right, which is consummated by the judgment.

It follows that whenever a stat gives a popular action, the king may bar an action by releasing the penalty, before any one has sued for it. But after a prosecution is commenced by the individual

Municipal Law.

Actions on Penal Statutes

Gen A 82.

116. 657.

2 Vol. 487.

the king can only release his part of the penalty.

2 Канк 392

2 MC 437.

And upon the same principle, the attorney general (in case *supra*) can not enter a *noli prosequi* except for the part which belongs to the king whom he represents. After the individual has commenced a prosecution, the king cannot in any way affect his interest. It is said by Mr. Thel. parliament I can do it - but no farther I apprehend than parliament cannot do wrong.

2 Hawk 392.

2 ²⁶ H. 911.

Where the penalty or part of the penalty is given to the party injured by the offence, the law cannot bar the right of that party, even before the commencement of it. As to him the state is remedial, his right is therefore antecedent to the action brought.

2 Hawk 392.

2 Vol. R 93.

The prosecutor in a criminal action might also at O.L. release his part of the penalty after conviction. A release before conviction would be nugatory for he then had no consummated interest, & another individual might commence an action to recover it.

3 Pl. 102.

2 Hawk 392.

Part by stat 4 Hen 5. It is provided that no covinous recovery is a popular action shall be a bar so and that no release pending the action shall be of any avail. The object of this stat is to prevent collusion in land ~~and~~ public justice. But I apprehend that a covinous recovery or release would be as strictly void as C.D. as by this stat. This stat being an ancient one is *prima facie* unimpaired in its.

Municipal Law.

51

Action on Penal Statutes.

Let the remnants of this stat should not be
 suggest it is further provided by 18 Eliz that the pro-
 secutor in a popular action shall not compare the
 suit, untill after answer made, nor then unless
 by leave of the Ct, on pain of pillory. This stat
 introduces a positive rule, and cannot therefore be
 in affirmance of the C.L., and I suppose would
 not be binding here not being made sufficiently
 early.

Mac 48.
 2 Hawk 297.
 12 R. 18.
 5 C. R. 98.
 10 R. 167.
 10 R. 49.
 Com. Di. act. stat.
 C. 2.

When composition is made by leave of the
 Ct under this stat the king's part is to be paid into
 Ct. But as on the one hand the king cannot
 release the penalty, after action brought, belonging
to the prosecutor — so on the other, the prosecutor
 at C.L. could not release the part belonging to the king.

4 Ann 1929.
 Com. act. stat.
 C. 2.
 11 R. 686. 66.
 2 Hawk 278.
 342

If the plff in a popular action dies, withdraws
 or surp a non suit, the public prosecutor may
 continue the suit, or commence a new one.

2 Hawk 292.
 5 C. 2. 86.
 3 M. 102.
 11 C. 63-6.
 300, 162.

But where the action is given by the
 statute to the party grieved by the offence and he
 dies, or releases, or becomes non suit during the
 action, the king or public prosecutor cannot proceed
 with it, for the penalty which belongs to the par-
 ty injured cannot go to the king, nor can the king
 prosecute for his representatives.

P.A.
 405 110.
 Nov. 58

Where several persons are convicted of an
 offence in a popular action one penalty only can
 be inflicted on the whole: but where several are con-
 victed on a public prosecution the penalty is inflicted

Municipal Law.

Actions on Penal Statutes.

Gr Bly 280.

Salt 182.

2 D. R. 309.

Mul 189.

Comp 610.

2 Est. 543.

1 N. R. 245.

2 Est. 569.

4 Ch. 13.

2 Com. 309.

on each. The reason is said to be that the former is a satisfaction and the latter a penalty. But I conceive the distinction to be founded altogether upon the different forms of the two prosecutions. The popular action sounds in debt - but the public prosecution is founded not even in fiction on a debt, but on the offence. But the debt where the debts are joined in the action must be joint and not several.

Comp 640.

In violating any rule of municipal law, several acts may constitute but one offence, when they are of the same kind and all connected as under the By stat against Sabbath breaking it has been holden, that labouring thro a day is but one offence.

On the other hand, one indivisible act may constitute more than one offence e.g. if a man should commit murder in the presence of a St he is guilty of a murder, and of a contempt &c.

1 Mac 2.

511. 519.

2 Heble 781.

Salt 200.

2 B. R. 10.

In popular actions in By the p[er]f. is entitled to no costs unless given by stat. But where the penalty is given to the party injured, he is entitled to costs of course, as on a criminal stat in an civil suit.

In Count in every mixed action the p[er]f. has costs, if he recovers judgment.



Master and Servant.

33.

Kind of Servants. —

A servant is one who is subject to the personal authority of another. A master is one who exercises that authority. The authority exercised must be personal. Thus every minor child is the servant of his father and every slave the servant of his master.

The authority of the master is a result of a compact between the master and the servant or guardian of the servant.

The kinds of servants known to the law of England are six. 1. Slaves. 2. Apprentices. 3. Domestic servants. 4. Day Labourers. 5. Agents and any kind. 6. Debtors in service. The first and last of these are not known to the Com Law of Eng.

1 Bl 420. 43.

1 Black 224. 2. 3. 4. 5. 6. 7. 8. 9. 10. 11. 12. 13. 14. 15. 16. 17. 18. 19. 20. 21. 22. 23. 24. 25. 26. 27. 28. 29. 30. 31. 32. 33. 34. 35. 36. 37. 38. 39. 40. 41. 42. 43. 44. 45. 46. 47. 48. 49. 50. 51. 52. 53. 54. 55. 56. 57. 58. 59. 60. 61. 62. 63. 64. 65. 66. 67. 68. 69. 70. 71. 72. 73. 74. 75. 76. 77. 78. 79. 80. 81. 82. 83. 84. 85. 86. 87. 88. 89. 90. 91. 92. 93. 94. 95. 96. 97. 98. 99. 100.

Slaves. It has been doubted by many whether slavery has ever been legalised in Court. The doubt however seems to have arisen rather from repugnance to the system, than from facts. Slavery can only be legalised, it is true, either by some principle of the natural law — of the common law, or of our own local laws. I am perfectly satisfied with Judge Blackstone's argument to show that slavery cannot be justified by the natural law.

1 Bl 423.

1 Black 211-9

Can slavery exist by contract? A man has no right to dispose of his own life — nor can he be allowed to make a ^{voluntary} sale of his liberty, i.e. his free agency. As to such a contract, the party can have no right of property, there can be no consideration for the sale of his liberty. There is no doubt, but that one may

Slavery.

bind himself to serve another ever for life. Nor that is merely disposing of his labor.

Can slavery on the principles of natural law, be created by birth, of parents who are slaves? This cannot be supported since on the former principles the parents could not be slaves.

Leff 4.
Salk 556.

Boyl 96
Leff 4.
Salk 186.
194. 22.
2 Vol 94.

2 Vol 15.
off 8.
Boyl 207

stat 141. 228.
207. 296.
299.

Root 264. 517.

Salk 556.

2^d. The Common Law does not, clearly, recognise any species of slavery. Indeed so strict is the O^p on this subject that the local laws of foreign countries in favor of slavery cannot be enforced in England. Indeed it seems to me well settled that a foreign slave landing in Eng^d becomes free, and is protected in the enjoyment of the rights of personal liberty, personal mobility, and private property. The villeins in Eng^d under the feudal system were not slaves, but were in a certain degree protected.

There is at this day no such thing as a villein in England. The tenure was abolished at the restoration by statute twelfth Ch 2.

3^d. As slavery legalized by our own local laws. It seems to me clear that if slavery was ever legalized by the laws of any country, slavery, to a degree has been legalized in Const^t. For stat upon stat has been made consistent upon the existence of slaves in Const^t. We have indeed

no judicial decision to the point arising upon a habeas corpus, but there are decisions recognizing the doctrine that slavery may exist. It has been decided in this state it is true that a master cannot maintain trover for his slave - because the master cannot have an absolute property in his slave.

Slavery —

Our superior Ct has determined that a slave may be sold, & taken an execution. Does not this necessarily recognise the existence of slavery?

Must absolute slavery however never did exist in Conn. The master here never has any power over the life of the servant, & it has been held that the slave may hold property, & sue even his master by his next friend.

The marriage of a female slave, with the consent of the owner is ipso facto an emancipation.

But by the marriage the slave contracted a new relation, from which new duties resulted inconsistent with a state of slavery — by consent of her master.

I do not find any case of this description decided. *Lit. p. 189.*
relating to williams v. the federal law. On the case 2 Bl. 92-4.
in Lit (cited) it does not appear that the marriage was by consent. But by the feudal law a wife was emancipated during coverture if she married a freeman, & her husband joined in the marriage her lord.
BoL 125. n. 2.
125. 2. 125. 4.
2 Bl. 92-4.

Can an illegitimate child be a slave by birth. By the civil law, the child of a female slave was a slave by birth & by immemorial usage this rule has been adopted in Conn.

In the English law of millenage, the condition of a child follows that of the father; but according to their law an illegitimate child is father's nullius, & therefore it cannot be shown that he is the son of a millen.

Master and Servant.

Apprentices.

Stat Don.
1799. 2. 17.

Slavery is now nearly abolished in England, and in a short time will be entirely. The importation of slaves is prohibited by act — and the importation of slaves is now prohibited by the laws of the United States and of all the States.

But tho' private slavery cannot be defended on the principles of natural law, yet it seems to be conceded that offences may for a time be deemed to a civil slavery in the public.

2^d. Apprentices. — These are so called from the French apprentice — to learn — because they are generally bound for a term of years to learn. Tho' they are usually bound to a profession of the mechanic art they are not always.

3 Bac 545.
6 Mo 182.
23 Ra 1117.
Falk 68.
3 Keble 204.

An apprentice cannot be bound even as to Law except by Deed. A parol contract of apprenticeship is not binding. I do not know with certainty the reason of the distinction between apprentices & other servants, who may be bound by parol. I apprehend however that the rule was adopted out of regard to the unusual strictness of the servitude of apprentices.

8 G R 379
Aug 1808
S L K

As a contract of apprenticeship cannot be created without a deed, so neither can a defective contract of apprenticeship be continued into a hiring by the year.

Suppose a person thus bound should leave the service of the master. He cannot be recovered as an apprentice or sued as an servant of any other description.

3 Bac 545.
8 G R 379.
East 525. 4.

It is now settled that it is not necessary expressly to use in the deed the word "apprentice", if the intention

Apprentices:

It is provided in several English Acts that the children of paupers may be apprenticed out by the overseers of the poor with the consent of two justices of the peace, 1842. without the consent of parents &c. and those to whom they are offered are bound to receive them.

We have similar statutes providing that the children of paupers "living idly and wasting their time" "poor children living idly and exposed to want" "any children incompetently provided for a grown idle stubborn and unruly" may be apprenticed out by &c. Stat Comm. 1842

All servants except apprentices, will be entitled similarly to wages for their service. In Eng^d the wages of servants in households are made uniform by the Statute of the seven years. In some ways of all descriptions are settled by contract.

Apprentices are regularly entitled to no wages unless stipulated in the contract. Indeed it is otherwise 3 D. 11 279 towards an apprentice to pay a premium to their master.

My Statute minor children are enabled to bind themselves as indentured of apprenticeship. But as the Statute does not in terms provide that the infant shall be liable on his indenture, it has been held

that he is not bound by his indenture unless he chooses. He shall not be ousted by implication of his privilege.

The only effect of the Statute is that while the relation subsists both parties enjoy the rights and incur the duties incident to the relation. The minor i. e. he does 1842.
1 D. 11 279.
3 D. 11 279.
4 D. 11 279.
5 D. 11 279. serve his master the full term, shall be free at his death.

Apprentices.

Long 200. 215.

1. 1815. 100.

We have in Court no such stat. But if the father or guardian joins in the indenture he is bound by this covenant, and it has been lately always been understood that in such case the master or guardian was bound by the covenant that, the apprentice shall faithfully serve &c, & perform the duties for which he is obligated.

But it has lately been holden in Mass. that the father or guardian is only bound by those covenants, which stipulate for acts to be done by himself and that the covenants for the performance of the servant are covenants of his own. I have some doubts of the correctness of this decision. In the case in Long's the indenture was different from the one in Mass. then the parties obligated themselves respectively for the performance of all the covenants &c, and so Marshall said it was too clear for argument.

1. 1815. 85. 90.

Long 200. 215.

In parish indentures by overseers (or select men in Court) they are not bound by the form of the indenture, for the performance of the duties of the apprentice.

1. 1815. 215.

It follows from the respective rights of master and servant, that, when of an apprentice is given cause for his leaving his master. An apprentice is not bound to serve a master who violates his duty to him.

1. 1815. 215.
1. 1815. 215.
1. 1815. 215.
1. 1815. 215.

In apprentice it is said cannot be discharged otherwise than by deed, for it is a rule that every agreement or obligation must be discharged by agreement.

Apprentices.

Agamiae quo obligatur. I trust however, that this rule extends to a bond agreement, not executed, or a licence, unless only. For Lord Kenyon lays down the rule that this relation of master & servant may be dissolved by mutual consent. This is analogous to the rule in other cases as bond etc. There cannot be discharged by a parol agreement unless executed, or acted upon. 8th H. 109.

And it has been holden in two cases in Bonn Lynne vs Master
 that a master having discharged his apprentice by parol, could not maintain an action in the covenant, that the apprentice should faithfully serve. For the agreement was acted under. If the first general rule were true in its extent, then cases could not be law. also
1 Day 150.
2 Day 120.
also
Barr 539. 630.
Dowd 250.
20 H 534.
17 H. 678.
17 H. 608.
to Mel. 509.

The rule at any rate can only relate to those cases, where the indenture remains with the master. 1st 552.
2nd 208.

Canceling a delivery up the indenture will discharge the apprentice, for the deed no longer exists as a deed.

It has been said that the bankruptcy of the master ipso facto discharges the apprentice. But the rule is, that the Bankrupt does not discharge, but the assignees in such case will discharge of course. 1st.
1st 124.
2nd 560.

Under our statute any apprentice may be discharged in the County Court for default of the master, & they have power by the same stat. to punish the apprentice for misconduct to his master. Or this may be done by the quarter sessions, and in some cases two justices, or one justice with an appeal to the sessions.

Apprentices.

4 Rep 425.
3 Bac 550.

utions, when the apprentice was bound by the authority of the justices. But where the binding was by the father of the apprentice they have no such power in England.

2 Vern 492.

In the usual form of indentures there is a covenant that the apprentice shall not contract marriage, without the master's consent. It has been held in however that if he does, the master cannot turn him away, but only have his remedy on the covenant; for a loss of service does not necessarily follow from the marriage.

1 Salk 250.
3 Do. 519.
Holt 154.
12 Mod 553.
Salk 53.
Dowd 69.

An apprentice is not by the Com Law assign-able by his master, because the contract is fiduciar-ly based on personal confidence. (The rule is different by custom of London.)

2 Ld Raym 1207.

Hence upon a controversy between master and servant referred to arbitrators, an award that the servant shall be assigned to another servant at Com Law, unless by consent of the servant.

But tho' an assignment does not at 62 pass the master's interest right in him, yet it is good as a covenant or agreement between the master and the assignee tho' the words used are words of grant or assignment merely and if the apprentice does not serve according to the assignment the assignee may have an action for covenant broken against the master. If the apprentice does serve under the assign-ment he acquires the rights of an apprentice.

Salk 68.
3 Do 550.
1 Wils 95.
Dowd 69.

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The apfigne cannot sue the apprentice or his guardian for neglect of the apprentice to serve him. *P. 18.*

As the master cannot apfign his right to the apprentice, he is bound as a general rule on the same *8 Mod 250.*
12 D 426
 principle to keep him under his own care, & is not at *2 Hbl 134.*
 liberty to send him abroad even for improvement; unless the nature of the business requires it or unless by consent. Hence a surgeon who sent his apprentice to operate in the army, was holden to have violated his indenture.

On the same general principle that the *2 Bos 55.*
 contract was fiduciary, the executor of the master *Salh 38. 58.*
12 D 54.
 cannot hold him after the master's death. *2 Bos 682.*

It has however been holden, that on the master's death the executor is liable on the covenant *12 C 192*
 to teach the apprentice, & is bound to procure him *1 Hbl 210.*
 instruction. This is repugnant to the former rule that *2 Hbl 1207.*
 the master cannot apfign the apprentice, and has been since denied to be law.

Whether the master's exec is bound to furnish the apprentice with diet & other necessaries is a distinct question, & the current of authorities seem to *Salh 41.*
Helle 701. 820.
1 Hbl 210.
 make him liable. The contract to furnish necessaries *12 C 500.*
12 C 50.
 is not fiduciary.

If the covenant mentions the exec by name this would seem clearly agreeable to the intention of the parties, but where the representatives are not named, I doubt whether this was the intention, and whether on principle the executor ought to be liable - On

Apprentices

the contract for necessities is made in consideration of the services of the apprentice. If a premium was given there may be a difference.

Where a premium was given by the apprentice the Exchequer Ch. has in a number of cases decreed a part of the premium to be restored when the master died during the term. Indeed in one case the Ex Ch. decreed a large part to be restored, when by a clause in the indenture a small part only was stipulated to be restored. This seems to me a violation of principle.

2 Barn 67.

Also when the master comes under the agreement the Ex Ch. decrees a restoration of part of the premium.

15th 20.

1 Mac 550.

The same has been done on the master's becoming bankrupt.

1 B & L 426.

10 Ann 514.

Balk 37 290.

11 Mac 112.

And it is now a settled rule that where the apprentice is discharged by the quarter sessions they may order a part of the premium to be restored. This has never been done by the Court of Chancery.

6 Mod 69.

11r 532.

20 L 117.

11 Mac 112.

Whatever the apprentice earns by his labor during the apprenticeship belongs to his master, even though he want it without the master's consent.

Lack 65.

2 Mac 29.

Even apprenticeship de facto will support the master's claim while the apprenticeship continues, though the indenture may be defective. So the apprentice must not avail himself of the character and privileges of an apprentice, without being liable to it's duties.

Apprentices.

If then the apprentice comes more to his own in the matter may recover this by any proper form of action against the employer.

But in case of an other servant (except a slave) the master is not entitled to wages there ^{6 L. 117.} earned without his consent. The master's remedy in ^{6 L. 7. 895.} such case against the employee is by an action on ^{2 L. 68.} the case for loss of service if the employee knew that he was his servant, or by an action for breach of contract against the servant himself. ^{2 L. 269.}

The master may always maintain an ^{Comp. 50} action for loss of service against the person who ^{Wood 1892} takes away his servant. A journeyman is a servant within the rule.

For taking away one's servant by force this ^{Mag. 115.} is a felony, — for enticing him away — the action must ^{2 L. 111. 1102.} be brought on the case. The ^{Sal. 550.} is however perhaps ^{2 L. 187.} said (incorrectly) by the reporter to have been ^{2 L. 107.} maintained. ^{Comp. 55.}

By stat. in doubt if a servant or apprentice ^{2 L. 287} above the age of 15 absents himself from his master's service without leave, he shall serve twice the time of his absence. He may be taken and brought back by force, & men may be empowered to make search and retake him.

Master and Servant.

Menial servants. Day Labourers. — Agents.

1 Bl 425.

Menial servants — These are the servants who in common language are called domestics being employed *intra muros*.

2 Bl 425

- G. R. D. 188

As to these it is a rule of Common Law, that if the time of service is not fixed by the contract, the hiring is construed to be for a year — on the equitable principle that one shall ~~serve~~ serve the other main-
tain throughout the several seasons. This rule Common Law is not known to our law.

1 Bl 425

1 Bl 425

5 Bl

5 Bl 1.

En Eng? by that a servant cannot in certain cases leave his master without a quarter's notice, &c. Day Labourers. — There are no general rules applicable to these exclusively, except in Eng? by statutes. These provide that all persons having no immoveable property may be compelled to labor and the justices settle their wages &c.

Ambl 252. 2913.

1 Bl 427.

Agents. — Factors, brokers, stewards, clerks, ship-masters &c. All these are servants in relation to such acts only as affect the property of their employers.

The employer has not the same general control over servants of this class as the master has over common servants.

They are bound however to act according to their contract. —

Factors.

September 18

such a number of classes, that it is difficult to
 lay down any general rules applicable to all.

The rules are generally laid down with res-
 pect to each particular class;

With respect to brokers factors are the most ^{strict}
 general rule so that their agent to receive their ^{10000 2.09}
 commission strictly, this rule is applicable to ^{Com Eng}
 sailors generally. If they do thus, they are not
 liable to their principals in case of accidents &c. ^{March 17.}

A factor is a foreign commercial agent re-
 siding in a different state from the principal, a
broker differs from a factor in that he resides
 in the same country with his employer.

A factor may retain the goods of his
 employer, not able to satisfy his accounts on ^{Inter 254}
 those particular goods, but to pay money, ^{11 Bar 293}
 due originating in any other transaction. ^{2 Bar 4. 235}
 By giving up the possession of the goods, the ^{2 Bl R. 104.}
 lien is lost. ^{1154.}

The reason why he loses his lien, by giv-
 ing up the possession, is that actual possession
 is essential to a pledge of personal property, un-
 less the pawnee be wrongfully deprived of the
 pledge.

The factor has the same lien on the price
 of goods in the hands of the person to whom

Factors.

Comp 251-5. He has sold them, and may compel that person to pay him the money.

2 Com 117. And the factor can have no lien on the principal's goods ~~where~~ ^{do not} they come to his actual possession, where they are for specific purposes.

3 D. R. 119. Suppose then the principal is a dealer in goods to the factor, who receives a letter informing him of it & a bill of lading, yet if the principal gives a different direction afterwards & the goods never come to the factor he has no lien on them. These rules are a part of the 2d Com Dis Mch & are a part of the CoL, no farther than the L M is a part.

1 Com 510. According to the rule that the factor must pursue his commission it follows, that if he gives more in the purchase, or buys less in quantity than ordered, his employer ~~may~~ ^{is not bound by} ~~must~~ the contract, if he purchases a greater quantity than he is authorized to buy his commission, the principal will be bound only for that quantity which he was directed to purchase.

5 D. R. 604. A factor has no right to pawn the goods of his principal for his own debt, for his lien is a personal right that cannot be transferred.

508. Besides this is strictly foreign to the interest of the factor, and if he does so the principal may bring action of trover against the pawnbroker, upon tendering to the factor the sum due to him (it is now held, that the pawnbroker is not liable).

Selling goods in their own names.

Whether the factor may pawn the goods for the debt of the principal, has not that I know been settled, but I see no reason why he should not.

A factor may however sell the principal's goods, tho' he cannot pawn them for his own debt. For this is properly his business.

He may sell them in his own name & on the purchaser in his own name for the price. He need not disclose the name of his principal as a common secret must. The reason then why he may sell in his own name, ^{as} ~~and usually~~ is, 1st That he has a beneficial interest in the sale of the goods, viz his commission.

2^d But I suspect that the strongest reason why he may sue is because he sells in his own name.

The same rule holds as to brokers ^{carriers} as to freight. They may sell the goods & maintain an action in their own names.

An auctioneer also may sue in his own name, being a species of broker.

It is the rule holds tho' the goods were known at the time by the purchaser to be his to answer.

In each of the preceding cases however the action may be maintained by the principal. He is not ousted of his action, tho' both cannot maintain the action together. He who first brings the action is entitled to the recovery.

Exp. de 201. 107.

1 Pl. Bl. 82.

2 Pl. Bl. 82.

Cour. 250.

7 Pl. Bl. 250.

Ball. M. P. 130.

2 Exp. de 293.

Chit. on R. 5.

L. A.

Park on Insurance.

ancey 400.

1 Pl. Bl. 81.

2 D. 591-2.

7 Pl. Bl. 253.

300 R. 100.

1 Pl. Bl. 81.

Chit. on R. 5.

Master & Servant

Auctioneer, Attorney, Public Agent

An auctioneer is not liable for selling goods to the highest bidder, tho' sold for a less sum than the owner directed. The reason is that such a direction by the owner is repugnant to the general principle of selling up goods and vendue.

Comp. 595.

The rule however is to be taken with this restriction, If the principal directs the auctioneer to set them up at a certain price and he sets it up for a less sum, and it is bid off for less, the auctioneer is liable to the principal.

An attorney has a lien upon the papers & judgment of his client for his fees, & may direct the adverse party to pay him the costs & not his client, & if that party does after such direction ~~does~~ pay to the client, the attorney may come upon him for the costs notwithstanding.

This rule does not apply to a counsellor but to an attorney. And this right of the attorney is subject to the claims of the adverse party on his client.

It is to the mode in which an attorney must execute instruments, & his client under title Deeds. & authorities.

An agent for the public contracting as such, is not personally liable on his contract.

- 1 B. R. 24. 122.
- 2 B. R. 687.
- 2 B. R. 240. 587.
- Donch. 100. 238.
- 2 B. R. 826.
- 4 B. R. 123.
- 5 B. R. 361. 436.
- 8 B. R. 30. 571.
- 1 B. R. 404.
- 10 B. R. 306.
- 11 B. R. 305.
- 2 B. R. 1415.
- 6 B. R. 177.
- 2 B. R. 142.

Debtors assigned in service. 12. H. 132.634.

The remedy of the other party is a claim on
the government itself.

This point has been decided by ^{1st Lt of the} the U.S. Cavalry in the case of the Hon: O. Dexter.

Thus far as to the sixth club.

servants of the last class are debtors assigned ^{Stat. Am. 2} in service, this is unknown at G. L., & created 33 by a stat. Our stat enacts if a debtor be taken by execution, and have not estate subject to satisfy the debt, he may be assigned to labour for the debt, to satisfy it. On the construction of this stat the Ct has been holden that the debt must be fair & honest & the claim meritorious. And then if the Ct think proper to assign him in service, they estimate his labour, and then he may be assigned for such a period that the value of his labour may satisfy the debt & costs. This practice is now however very unusual, & the Ct will take a great number of considerations into view, in order to avoid it, the stat is now a mere dead letter.

The authority of the master in this case *Barly* 23.
must be merely personal, he cannot trans-
fer it, it cannot be transmitted & it cannot
descend.

Master & Servant.

When the master is bound by the acts of the servant & when he may take advantage of it. — The general principle that regulates the law on this subject is, that those acts which are done by the command of the master, ^{in judgment of law} are the acts of the master.

And all acts done by the servant in the performance of the business for which he is employed to his master, are considered as done by the command of the master: *qui facit per me*.

Whatever the servant does by the express command of the master, whatever the master expressly permits him to do, & whatever he does in the general scope of the business, a general authority given him by the master, are all acts of the master.

A contract then made with a servant as such, he having authority to make it, is made in legal contemplation by the master himself.

On the other hand if the servant is cheated out of his master's property, the master may recover it out of the hands of the wrong doer.

If a servant is robbed of his master's goods in the absence of the master, not the master or servant may have an action against the thief to recover.

The servant's right to sue is said to be founded on his liability over to his master.

1 Rol. 420.
2 N. B. 422.

4 Bac 504
2 N. B. 411.

1 Rol. 98.
Er J. 223.
3 Bac. 504

1 Rol. 105.
Er J. 465.
3 Bac 59.
19.
239.

General rules. -

This I conceive to be incorrect, for the general rule is that the servant is not liable in all cases he is *prima facie* not liable.

The true reason is that the goods are considered as the servant's as against all persons except the master, which principle holds of all bailors. It is also highly expedient that the servant should have this right, but one only can recover as to all these persons a bare finding of possession of goods is considered as conferring all the rights of ownership.

And in this case a recovery by ^{either} the latter ¹²³ or master will bar the other. And the commencement of the action by either of them will prevent the other from proceeding.

When a servant sues ^{he} declares of the property as of his own goods.

2 Bac. Dg.
2 Jac. 379.
Palk 276.
3 Mod. 239.

But if the servant be robbed in the presence of the master the latter only can maintain the action, for then the goods are considered as being taken from the master.

Salk 513.
Barth 148.
1 Hawk. 148.

If the master's money is gained from the servant by an illegal contract the master may recover it, as if he lost it by gambling, but if he squander the money, then being no fraud or illegal contract, the master cannot have a remedy against the receiver, but only against the servant. But if the receiver know how the

484
2 Bac. 559.

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servant procured the money, it will be considered fraudulent.

1 Bl 420.
8 Bo 82.
2 Bac 595.
1 Mot 295.

Liability of inn-keepers for the acts of their servants, is considered under the title of Inns & inn-keepers &c.

1 Bl 420.
11 Lib 525.
Esp. de 580.
588.

If a servant does an unlawful act in the command of his master both master and servant are liable - either on a criminal prosecution or action by the party injured. The servant is bound to obey only the lawful commands of his master.

2 Bac 568.

But if a servant in obedience to his master's commands does a wrong of which he was ignorant, he is not liable unless there is some culpable negligence in him. His ignorance must be as to the fact, and not ignorance of law, for ignorantia legis neminem excusat. The reason why the servant is not liable is that he is an involuntary agent. As if the master falsely imprisons one & gives the key of the door to a servant ignorant of the fact; the servant is not liable.

This rule however is the terms as it may be liable to mislead. It can apply only to acts in themselves lawful. It does not generally hold if the act done is itself unlawful, or if it constitutes a forcible injury.

2 Bl 2 592.

1 Mot 292.

For in such cases the law does not regard the intent, when a civil remedy is sought. So if I demand my servant that I am the owner of my neighbor's land & order him to cut trees, he is liable as well as myself.

General Rules.

When he act itself is unlawful, the person committing it, is liable for all the consequences. 1804 292

Those acts of the servant which are not done by the command express or implied are not considered in law the acts of the master.

When the servant acts without the direction of the master, and not in discharge of authority or business in which he is employed by the master, he acts without the command of the master. The master then is not liable for injuries thus occasioned to third persons nor for contracts with them. ^{Thir 228}
^{3dalt 289.}
^{1 Bl 6421}
^{8 D. R. 533.}

Suppose then that a servant leaves his business in the field & commits a battery, the master is not liable, not having directed his servant to do it. So if a minor child commits a trespass the father is not liable, there we suppose the master not to direct it. The parent is liable only for the acts of his child, on the ground of the relation of master & servant. If the servant without authority express or implied makes a contract the master is not answerable.

Upon this principle it has been decided that if a servant while performing his master's business, intentionally commits an injury upon another, the master is not liable. As if a servant drives his master's carriage, he should not be liable for driving it against another and injuring ^{Blk Com}
^{Christians note}
^{1 East 106}
^{1 D. R. 472}

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General Rules.

Case 106.
 9 B. & W. 472
 2 All. 441.
 3 D. R. 228.
 2 D. R. 762.
 2 D. R. 184.
 contra
 11 D. R. 465.

If the master is not liable. For in the commission of that act he does not act in pursuance of his master's directions.

If he commits a wrong in discharge of his master's business his master is liable, for he is acting in furtherance of that business, but if he commit a wilful wrong, while employed in his master's business, he does not ~~consider that he is acting in furtherance of his master's business~~ but such an act is a deviation of it.

Now the rule that the master is not liable for a wilful wrong of the servant is not universal as will be shown hereafter. If the servant by the commission of a ^{wilful} wrong violate the contract of the master the master will be liable as for a breach of contract.

On the other hand if the servant in performance of his master's business commits through negligence or want of skill a wrong upon a third person, the master is liable. This then is a cardinal distinction.

Where a servant ^{unlawfully} employed by his master commits a wilful wrong the master is ^{not} liable, but where through negligence or want of skill he commits the wrong, the master is liable. The master must set his servants on a very careful servant in the performance

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It is the master's duty to provide for the safety of his servants, but he is not answerable against 62 R 125.
the unruly, fractious or his servants, nor against 52 R 645.
acts solely, foreign to his business. The master 2 QB 442.
is liable for the conduct of his servant as the 1 East 105.
servant is not answerable, not as the master's
willful offence. 12 R 431.

Where the servant drives a carriage against
another through neglect he drives for his master,
but if he drives in wilful disobedience, he does not drive ^{for} the master. 10 R 241.
for his master as if while driving, 23 R 739.
he should throw a stone at the other carriage. 10 R 241.

If a surgeon's apprentice injure a
wound through negligence or ignorance, the
surgeon is liable. 2 Rolle 693.
3 Acc. 560

So if a blacksmith's apprentice in
driving a horse lames him through negligence
want of skill the master is liable. On these
last cases however I conceive that the
master would be liable even if the wrong
was wilful. In this case and the last he would
be liable on the ground of a violated contract. 10 R 241

These distinctions between negligence
and wilful wrong have been but lately
settled. There are three cases which have been
decided relative to this subject.

The first was determined in 1792 in 52 R 125.
In this case the master was liable on the case was

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Case 463 Brought against the master, because his servant had indulently driven his carriage against another and injured it. The decision is correct ^{and not case should be brought}. The reason for it is false, being that trespass

2 H. Bl. 442 1772. The reason was in the Ct of B. L. an action of trespass on a ground that the servant had negligently driven his carriage, the Ct held that action on the case and not trespass should be brought. Here the decision and the reason were correct; ———.

Case 10 1800. In this last case, trespass was brought *16 H. Bl. 472* for a wilful wrong, in the servant for driving his carriage indulently against another, but was justly decided that the master was liable. & this is now the rule.

It is somewhat singular how the principle has run thro' the five questions in these cases.

2 H. Bl. 442 Without doubt, when the master is liable for any injury committed by the servant even a forcible one, without that direction trespass on the case must be brought for he is guilty of neglect. And not trespass for that would be to subject the master to an indictment for the breach of the peace, for the crime of the servant, which would be monstrous. This cannot be imputed in most cases to an indictment for trespass.

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General Rules.

Where the action is brought against the person himself who committed the wrong, it makes no difference in the form of action whether the wrong was wilful or negligent.

If a servant employs in his business another servant who through negligence or want of skill injures another the master is liable. *Moss v. B. & C.*

The case in which this principle was determined carried it somewhat further. *O.C.R. 411.*

I have always felt a degree of doubt as to the correctness of the decision, as the first servant was employed for that particular purpose, and not to have been trusted with authority to retain others. From the authority it must be considered law however. In this case the action lies only against the master or the immediate author of the injury, the intermediate servant is not liable for he does not commit the injury, nor does he employ the last, for he employed him for his master. *O.C.R. 411.*

The rule that the master is not liable for the wilful torts of the servant, cannot hold where there is a contract involved between the master & the party injured.

Thus suppose a blacksmith's servant in shodding a horse negligently lacerates him, I conceive the master to be clearly liable.

{ 1 H. Bl. 154
Lo. Ray. 76
Hone & Price 735
Blacken 165.6

General Rules

18th Dec 154

2nd Dec 165.6

2nd Dec 910.

Jury on Bail 73.

74.

In all such cases, there is an implied contract that all due care diligence shall be used, and if there is a deficiency in these requisites, the master is liable for the breach of the contract.

I wish it however to be distinctly observed, that the master as I conceive is liable solely on the ground of the breach of an implied contract. If so he is not liable for the result tant as a tort.

There is a certain class of rules relating to the liability of sheriffs for the doings &c of his deputies and under sheriffs, but as there is a distinct title on sheriffs and jailors I will refer you to that.

September 21st

A post master is not liable for the defaults of his servants or subordinate officers.

He has no hire from the individual who entrusts property to ~~entrusts~~ the mails, he is paid by the public, & therefore is not liable as a common carrier.

But so far is the reason of his exemption from ~~from~~ liability to individuals, is that he is a public servant, & is therefore ^{free} liable for an injudicious selection of subordinate agents to the public only.

2nd Dec 1620

2nd Dec 1650

2nd Dec 1654.04

2nd Dec 1654.04

2nd Dec 1654.04

But he is liable for his own actual defaults in the transaction of his business.

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individuals injured. A man in public office is not released by his public situation, from responsibility for injury to individuals, by his own default, nor is his agent, but he is not liable for the acts of such public officers should receive the money of another to his own use he is liable to the individual injured in indelible.

If the master's liability on contracts made by his servant.

Here the general rule is, the master is bound by contracts made for him by the servant whenever the servant in making the contract acts within the scope of an authority delegated to him by the master.

This authority may be general or special, express or implied.

A general authority is one that is not confined to one particular contract but which extends to all contracts generally or all of a particular kind. Thus an authority to purchase necessities for the family is a general contract authority.

A special authority is one that is confined to one or more specific transactions. As an authority to purchase a horse.

A general authority may be implied from the master's usual or frequent practices.

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Contracts of the Servant.

As if a master has usually permitted his servant to purchase necessaries for the family.

And a special authority may be implied, the instances of this kind are very rare. As if the servant makes a contract in the presence of his master for him; his silence implies an authority given to the servant.

If a master however has made it a practice to purchase send his servant to purchase with ready money, & has never permitted him to purchase otherwise, he will not be answerable for what the servant may afterwards purchase on credit. For there cannot be here any general authority implied.

On the other hand if the master has usually or frequently permitted the servant to make purchases for him or himselt, the master will be liable for similar contracts of the servant tho' the servant makes them to discharge his master.

A permission however given to the servant to trade with a particular person, as e.g. I will give him credit with A only and will not give him credit with the public.

And if a servant without any authority general or special buys goods for his master which come to his use the master is liable for them.

2 A.
1 De 220.
1400 Cont 1342

5 Bait 232
1 Shaw 95
1400 400.

1 Aik 234.
Combert 450.
3 Noble 625.
3 Ch 20

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Suppose however that in the last case, that the master had sent the servant with money, & he had retained the money & took the goods on trust, & that the goods come to the master's use who supported the money to have been paid for them. Will the master be liable? My answer appears is that the master is not liable. I go upon the ground that he is not liable in such a case, except from his subsequent assent. But here there is no such subsequent assent, because he is ignorant of the contract. If it be asked in who ought to suffer the master who employs the servant or the trader the latter clearly for there is no authority given to the servant, & the master has done nothing which can induce the trader to imagine such authority, & it is his own fault if he trusts the servant without any ground for it.

But tho' a master has permitted his servant to trade for him on credit, he may discharge himself from liability to his contract by giving notice that he will not be bound in future. But he cannot thus discharge himself by private orders to the servant, nor can he discharge himself for a time from such liability by a periodical review of the relation between himself and the servant.

23 R. 224.
5 Salt 234.
3 T. R. 750.
11 Mod. 110.
3 Esp. Cases 214.
5 B. & C. 86.
Rake M. L. 2.
1 M. L. 38.
1 Str. 506.
3 Billa 625.
2 L. R. 925.
Holt 120.
Comb. 450.
1 Com. Con. 219.
3 Esp. Cases 65.
1 B. & C. 550.
6 Mod. 36.
Esp. Dig. 115.
Comb. 450.

Master and Servant Contracts made by the Servant.

The general rule is that the prohibition on the seller ^{on} the deprotection of the law is between the master & serv^t should be as public as the credit was.

If the serv^t in making a contract or selling property by the direction of his master, makes a warranty, his master is bound by the warranty, unless the serv^t was expressly forbidden to make it.

And where the serv^t ^{makes a warranty} ^{conize with} gives effect to a general authority, (even an express prohibition, not made known to the purchaser or the public, to make a warranty,) the master is bound by it. But where the serv^t acts on special authority the master is not bound by his warranty, for then there is no general rule giving to the serv^t the inducement to believe that the servant was entitled to make a warranty.

If these principles be correct & the decision in the case of *Ex parte* appears to me incorrect. It was that a man in *Calif* having a number of counterfeit jewels, gave them to his serv^t to carry them and sell them to the king of *Barbary*, saying nothing of their being counterfeit. He went, and sold them to *Ho*, who then sold them to the king who soon dis-

38. R 460-1
10 Mar 109
12 D. 246
Mass R 42
184
Chit on Mac
26. 24.

38. R 460
4 D. 134
184
Salk 690.
189
189

38. R 460.
10 Mar 109.

same case
Ex 469
184
184
184
184

Contracts of the Servant.

comes their being counterfeited & compelled to
 to refund the money, to come upon the orig² Roll 112.
 inal owner of the jewels for his money, ² 112.
 said to it, it was held that the action would
 not lie, because the master had not given
 it express authority to make a warrant.
 *But a concealment of defects is a war-
 ranty, and therefore the master should be
 liable.

There is another case, If a master
 sends his servant with an unroused horse
 knowing him to be so, to sell at a fair, but
 not to any particular person, ¹ Roll 95.
 the will not be liable, while if he had
 sent him to be sold to any particular person
 it is said that he would have been. This
 distinction I conceive to be grounded on no
 substantial principles.

According to the general rule if a
 clerk sells goods for his master, & warrants
 them ¹ the master is bound by it. Where ² Roll 282.
 there is a general authority if the servant makes, ³ 112.
 a warranty the master is bound by it. ⁴ 117.
 tho the master should have made a private
 prohibition to the servant, for the latter acts
 under a general authority.

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1 Hollie 95.

2 Hollie 270.

The servant himself is regularly not liable for his master. He may however subject himself personally, by making a warranty upon his own name.

2 Vern 129 in the name of his master a contract which he has no authority to make, & by which his master is not bound, he is personally liable for it. But it seems to me that the servant cannot be subjected on the contract as a contract except in equity.

128

For the declaration in L would make the contract to make him liable upon it as a contract to be in his own name, whereas the fact is that according to the terms of the contract the master makes the contract through the servant, and there is no express contract by the servant himself that he will pay. I suppose however that the servant might be subject at L to an action on the case for deceit, and also to an action of trover.

But how ~~then~~ can this be enforced in a Ct of Eq as a contract — A Ct of Equity can compel a party who has raised an expectation, to perform what he has given reason to the other party to expect, so that

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Contracts by the Servant.

The St wants to compell the serv^t to do that which he has given the other party reason to expect that his master is to perform.

The St man's wife & c., relation or friend acting for him under a general or special authority, are subject to the same rules as govern in case of master and servant. 18C 230

By a stat of Can it is enacted 18C 289. That if any person permits his serv^t to contract, that he is liable upon such contract, and that without such consent no such contract is binding. Now the question arises to what cases this stat extends. It cannot surely be understood to extend to every case. I apprehend that this stat extends only to minor serv^{ts}, who are apprentices or menials and slaves, to those only who are under the master's personal government, nor even to them, unless under age.

The stat goes upon the ground that it is bad policy to permit the serv^t to contract, but this principle cannot extend to all kinds of serv^{ts}. The words of the stat are "under the personal government," which implies those who are under the personal control and domestic government of the master.

Master and Servant.

Servant's liability for his defaults.

It was formerly held that the master
 22 Q. B. 247. was liable for all expenses & income
 by the illness of his servt. But the rule
 is now fully settled that he is not.
 1 Exch. 298. But his cases
 are now overruled.

But in case of apprentices the master
 is usually covenant to bear such expenses
 but without such contract he is not
 liable.

How far the servant is liable for his
 defaults to his master or a stranger.

Those acts of the servt which are done
 without the command of the master express
 or implied are not in law the acts of the master.
 For those consequently the master is not liable
 and the servt is of course.

This rule applies regularly to all acts
 in which the acts of the servt are not in the
 pursuance or discharge of the business or author-
 ity given him by his master.

See 206.

Feb 18.

See also 175.

Ex. 175.

Ex. 175.

Where a wrong is committed by a servt
 for which his master is not liable; the servt is
 himself liable of course.

There are other cases in which damages
 incurred by the acts of the servt may have been
 recovered against either the master or servt.

And the rule in these cases seems to be
 that if the servt in performance of his master's
 business requires another through negligence,

Master and Servant.

Servant's liability for his defaults.

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the remedy will lie against either the master or servant.

This rule is to be taken with the proviso that the transaction in which the servant was engaged, was not founded on any contract between the person injured. For if the transaction was thus founded, the party injured can have his remedy against the master only. *St. 1033.*

As if the servant negligently or carelessly drives the carriage against another and injures it, the master & servant are both liable. The servant because he is the immediate author of the injury, and the party injured has a right to consider him the only party concerned, & is not bound to enquire whether he is employed by another. *St. 1033. J. Ma 220. Esp. 1350.6.*

But if the injury or transaction in which the servant is engaged be founded on a contract between the master & party injured, the latter must look to his remedy against the master.

Now the master is liable upon a contract express or implied.

Thus if a smith's apprentice comes my horse from want of skill, my remedy lies only against the master. How far the master can have a remedy over against the servant will be considered hereafter.

*Jalk 603
Camp 205
1706 C. 451*

Master and Servant.
 Servant's liability for his defaults.

I suppose the reason why the servant is not liable, to be, that the bailment being upon the contract of the master, if the contract be violated the master is liable for the breach of his own contract existing between him only ^{in such cases} against the stranger.

The servant ^{in such cases} acts in pursuance of the command of the master who therefore in such cases becomes as it were identified with the master.

There is indeed an exception to this rule, in the case of the ship master he is liable as well as the owners of the ship to the freighters for his negligence or want of skill. This is an admitted exception to the general rule & therefore fortifies it.

J. No 220.

Part 88

Falk 440

Bent. 100

208

Let Holt on a case of this kind later pains to distinguish a ship master from a common servant, and to make him an officer. But the exception is founded on the principle of convenience.

And if any servant commits a wrongful tort he is liable in all cases to the party injured even tho' the business or transaction in which he is engaged be founded on a contract between the master & the stranger. Thus if the apprentice unlawfully takes a horse, he is personally liable, for in the

Servant's liability for defaults.

cases the servant is not considered as acting in the command of his master. It is an alien-
 domment of the authority with which the East 106
 servant is entrusted, a distinct and wilful wrong.

The servant becomes ipso facto a stranger to his master as to the tort, tho' the master is still liable; & if the master had done it I conceive that the party injured may waive the contract, and bring his case against the master.

I have already observed that a public officer is not liable as such in contracts made for the public. And in pursu- Comp 69
 ance of this principle, if an officer of the revenue, by mistake receive over payment, the party cannot have the his remedy against the officer, but must make application to the government.

But a public or official station will not screen a man from the consequences of his own frauds or wilful wrongs. If he illegally extorts money from Comp 182
 another under colour of his office, for his own use, he is liable to an indebitatus assumpsit for money had & received. Here he does not act in his official capacity but as an individual, under colour of his office.

Master and Servant.
 Servant's liability to the master for injuries

125. If an attorney for a party who ^{is} guilty of any fraudulent practices against the other party, he is liable to the injured party in damages.

But it is said that if an attorney knowing that the p^{ty} has released the d^{ft} and brings an action against the d^{ft} in the same case the attorney is not liable.

The attorney is guilty of no fraud in this case. But if he hatches a fraud himself he is liable, but if he acts in pursuance of orders from another, to carry a fraud into effect he is not liable. He is guilty of no fraud or practice, but merely employs himself of those means which another gives him to enforce a fraud, and the Ct. and jury must decide, and he has no right to decide respecting the merits of the case.

Under what circumstances the serv^t is liable to the master for injuries.

As to this subject the general rule is that the serv^t is liable for the master for all wrongful wrongs & for all neglects by which the master is injured.

11081 155
 2 Dec 264
 That under a serv^t who is liable with-
 cable, some of which were sufficient to
 in his neglect the serv^t was liable
 to recover a verdict which awarded the

Master and Servant.

Servant's liability for injuries to the master.

91.

goods of his master where the owner has been paid by which they became forfeited, the clerk was held liable to his master.

Be 9205
11 Mod 109
3 Bae 504

But no action will lie against a servant for a bare breach of duty where no damage is sustained. In such cases the master's right of correction is the only remedy the law affords. And is adequate, for where no injury is sustained no damages should be recovered.

But if the servant disobeys any lawful command of the master, who sustains damage thereby, the servant is liable in damages.

10 id 295
10 id 188.
2 Bae 38
Moore 248

The rule is the same where there is a neglect of duty & consequent damage, tho' there be no express command. As if an attorney neglect the business of his client. As if he neglect to appear at Ct, and his client suffer a nonsuit, he is liable to his client.

Exp De 614
2 Wils 325
4 Burr 2500.

The servant regularly undertakes only due diligence & fidelity to his master, that is all that is implied by law. He may expressly bind himself for more as that what he does shall be done skillfully. This rule is not universal, for if a man employs a man in his profession, the latter does implicitly engage that he will per-

Master and Servant

Servant's liability to his master for injuries.
perform the work skilfully, but under a ^{new} Bailment

Leaving such excepted cases over as when
the servt is liable to his master for such
injury only as are occasioned by his want
of diligence & fidelity. Hence the servt
is not generally liable for robbery. Ordinary
care and fidelity are all that is re-
quired of him. Care & fidelity may guard
against an exposure as great the danger
but not against acts of violence. Servts
in general are not liable for injuries oc-
casioned by those acts against which ordi-
nary care & diligence are not a sufficient
guard.

And servts are liable over to the mas-
ter, ^{has been subjected} whenever the master is liable to dam-
ages for injury occasioned to third persons,
the ^{except} the negligence of the servt.

This rule however supposes the master
not to have been actually a party to the
wrong. He is indeed by legal fiction or im-
putation always made a party. Most if he
was actually a party in the wrong, as if
he commanded the servt to do it, he can
have no claim whatever on the servt.

For here the master and servt are both
wrong doers, the law never admits an imputa-
tion, & more especially over of one party to the other if
one rather both.

4884

2 Mod 109.
2 Mac 5642 Str 1682.
2 Mod. 109.

Baird 164

2 N. 186

Reilly 110.

Master and Servant
Master's authority over his Servant.

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As to the question how far the servant is liable for criminalities for the embezzling, and his master's goods, I will refer you to the title of *Placens*.

Master's authority over his Servant.

The master has a right to chastise his servant for any breach or neglect of duty, as for disobedience insolence &c.

188/175.
188/28
188/111, 100.
188/170.
2 Noble 628.
as ch. 179.

But the correction must be reasonable itself as well as for a reasonable cause. There must be some proportion between the punishment and the offence. For an outrageous punishment the master cannot be justified.

This right of correction does not extend to all servants. Those of the fifth class are in general not liable to correction - they are servants not made only. A merchant's clerk, whomence possible may be. Most clearly factors attorneys &c are not.

In principle I conceive, that the right of correction applies only to those servants, who belong in the character of servants to the master's family, and are subject to his personal domestic government. The books however do not tell us to what classes of servants the rule does extend. I apprehend, the master can only chastise as paterfamilias, in the exercise of a sort of patriarchal authority. He may then chastise his slave his apprentice, his menial servant, and perhaps in some his debtor assigned in service.

Blackstone observes that an apprentice and any

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Master's authority.

age is liable to correction, & so also is a slave of any age. But if the master beats any other servant of full age, or if his wife does it, the servant may depart.

The master can never justify the wounding his servant, under his right to administer correction as master. 2 Mod 107. If then the servant sues his master for assault and battery & wounding, & the master justifies by a plea to the whole on the ground of his right as master, his plea is bad for the whole. He should plead not guilty as to the wounding and a justification as to the battery. other.

When in an action thus brought by the servant, the master must state in his justification, the retainer of the servant, the place where, and the business in which, the servant was employed, for these facts are issuable. 1 Sid 174.

This right of correction is personal in the master & he cannot delegate it to another. 2 Mod 107. 10 Mod 67. 20 Mod 62. 21.

If however the master puts his servant to school the schoolmaster may correct him for reasonable cause. His right arises from a breach of duty to himself, & he acts therefore not by an authority delegated by the master of the servant.

If the master happen to kill the servant in correcting him, he is guilty of excusable homicide, manslaughter, or murder according to the circumstances of the case. 1 Hawk 111. 1 Mod 252. 257. 258. 259. 260. 261. 262. 263. 264. 265. 266. 267. 268. 269. 270. 271. 272. 273. 274. 275. 276. 277. 278. 279. 280. 281. 282. 283. 284. 285. 286. 287. 288. 289. 290. 291. 292. 293. 294. 295. 296. 297. 298. 299. 300. 301. 302. 303. 304. 305. 306. 307. 308. 309. 310. 311. 312. 313. 314. 315. 316. 317. 318. 319. 320. 321. 322. 323. 324. 325. 326. 327. 328. 329. 330. 331. 332. 333. 334. 335. 336. 337. 338. 339. 340. 341. 342. 343. 344. 345. 346. 347. 348. 349. 350. 351. 352. 353. 354. 355. 356. 357. 358. 359. 360. 361. 362. 363. 364. 365. 366. 367. 368. 369. 370. 371. 372. 373. 374. 375. 376. 377. 378. 379. 380. 381. 382. 383. 384. 385. 386. 387. 388. 389. 390. 391. 392. 393. 394. 395. 396. 397. 398. 399. 400. 401. 402. 403. 404. 405. 406. 407. 408. 409. 410. 411. 412. 413. 414. 415. 416. 417. 418. 419. 420. 421. 422. 423. 424. 425. 426. 427. 428. 429. 430. 431. 432. 433. 434. 435. 436. 437. 438. 439. 440. 441. 442. 443. 444. 445. 446. 447. 448. 449. 450. 451. 452. 453. 454. 455. 456. 457. 458. 459. 460. 461. 462. 463. 464. 465. 466. 467. 468. 469. 470. 471. 472. 473. 474. 475. 476. 477. 478. 479. 480. 481. 482. 483. 484. 485. 486. 487. 488. 489. 490. 491. 492. 493. 494. 495. 496. 497. 498. 499. 500. 501. 502. 503. 504. 505. 506. 507. 508. 509. 510. 511. 512. 513. 514. 515. 516. 517. 518. 519. 520. 521. 522. 523. 524. 525. 526. 527. 528. 529. 530. 531. 532. 533. 534. 535. 536. 537. 538. 539. 540. 541. 542. 543. 544. 545. 546. 547. 548. 549. 550. 551. 552. 553. 554. 555. 556. 557. 558. 559. 560. 561. 562. 563. 564. 565. 566. 567. 568. 569. 570. 571. 572. 573. 574. 575. 576. 577. 578. 579. 580. 581. 582. 583. 584. 585. 586. 587. 588. 589. 590. 591. 592. 593. 594. 595. 596. 597. 598. 599. 600. 601. 602. 603. 604. 605. 606. 607. 608. 609. 610. 611. 612. 613. 614. 615. 616. 617. 618. 619. 620. 621. 622. 623. 624. 625. 626. 627. 628. 629. 630. 631. 632. 633. 634. 635. 636. 637. 638. 639. 640. 641. 642. 643. 644. 645. 646. 647. 648. 649. 650. 651. 652. 653. 654. 655. 656. 657. 658. 659. 660. 661. 662. 663. 664. 665. 666. 667. 668. 669. 670. 671. 672. 673. 674. 675. 676. 677. 678. 679. 680. 681. 682. 683. 684. 685. 686. 687. 688. 689. 690. 691. 692. 693. 694. 695. 696. 697. 698. 699. 700. 701. 702. 703. 704. 705. 706. 707. 708. 709. 710. 711. 712. 713. 714. 715. 716. 717. 718. 719. 720. 721. 722. 723. 724. 725. 726. 727. 728. 729. 730. 731. 732. 733. 734. 735. 736. 737. 738. 739. 740. 741. 742. 743. 744. 745. 746. 747. 748. 749. 750. 751. 752. 753. 754. 755. 756. 757. 758. 759. 760. 761. 762. 763. 764. 765. 766. 767. 768. 769. 770. 771. 772. 773. 774. 775. 776. 777. 778. 779. 780. 781. 782. 783. 784. 785. 786. 787. 788. 789. 790. 791. 792. 793. 794. 795. 796. 797. 798. 799. 800. 801. 802. 803. 804. 805. 806. 807. 808. 809. 810. 811. 812. 813. 814. 815. 816. 817. 818. 819. 820. 821. 822. 823. 824. 825. 826. 827. 828. 829. 830. 831. 832. 833. 834. 835. 836. 837. 838. 839. 840. 841. 842. 843. 844. 845. 846. 847. 848. 849. 850. 851. 852. 853. 854. 855. 856. 857. 858. 859. 860. 861. 862. 863. 864. 865. 866. 867. 868. 869. 870. 871. 872. 873. 874. 875. 876. 877. 878. 879. 880. 881. 882. 883. 884. 885. 886. 887. 888. 889. 890. 891. 892. 893. 894. 895. 896. 897. 898. 899. 900. 901. 902. 903. 904. 905. 906. 907. 908. 909. 910. 911. 912. 913. 914. 915. 916. 917. 918. 919. 920. 921. 922. 923. 924. 925. 926. 927. 928. 929. 930. 931. 932. 933. 934. 935. 936. 937. 938. 939. 940. 941. 942. 943. 944. 945. 946. 947. 948. 949. 950. 951. 952. 953. 954. 955. 956. 957. 958. 959. 960. 961. 962. 963. 964. 965. 966. 967. 968. 969. 970. 971. 972. 973. 974. 975. 976. 977. 978. 979. 980. 981. 982. 983. 984. 985. 986. 987. 988. 989. 990. 991. 992. 993. 994. 995. 996. 997. 998. 999. 1000.

Master and Servant.

95.

Master's remedies against third persons for injuries done in relation to his servant.

An action lies in favor of the master against any one, who entices away his servant. This action is laid with a *per quod servitium amittit*. This is the gravamen of the action. Bent 50.
8 Mo. 132.
Salk 380.
2 Do. 117.
1100. 24. 2. 2.

If a man's servant is taken away by force, it is said that *trespass*, with a *per quod se* is the proper form of action; but if there is no force the remedy is in case. And if a servant without enticement and without licence leave the service of his master, and is afterwards by another who knows of the situation the latter is liable to an action *per quod se*. Salk 191.
2 Do. 18. 10.
2 Do. 117. 1002.
Salk 380.
2 Do. 117.
Bent 50.
2 Do. 50.
Mo. 1010b.

But an indictment does not lie against a person enticing away the servant of another. It is a civil injury merely.

If a servant is beaten by a stranger, the servant himself is entitled to an action for battery. The master can only have an action for loss of labour accruing from it. The servant recovers for the injury to his person; the master for the loss of labour. The actions are therefore specifically different, and a recovery in one is no bar to the other. 9 Do. 113.
17 Do. 101.
2 Bulst. 198.
124 175.

The master must declare with reference to it or he cannot sustain his action. If a minor child is at issue a servant within these rules, and an adult child may be. And it is on this ground only, that a parent may recover for a servant injured to his child in consequence of which he has sustained a loss of service. 9 Do. 113.
2 Mol. 682.
9 Do. 113.
1 Mol. 6. 429.

Master and Servant.

What acts the master & servant may, possibly, in relatⁿ to each other.

On this principle only it is, that one standing in loco parentis may maintain an action for debauching a female child. The gist of the action is the loss of service. But the rule of damages has been extended beyond that.

2d ed 89. 80.
2 Nal. 588.
Nay. 239.

If one beats the servant of another to such a degree that he dies, the master according to the B.L. has no remedy; for the private injury is judged in the public offence. In Com^{ts} we have not adopted the doctrine of merger in many other cases, perhaps it would not be less.

1 Nal. 98.
1 Nal. R. 124.
2 Nal. 232.

If a surgeon employed to cure the servant wounds intentionally, injures it by improper treatment, so that the master loses his service, an action per quod will lie in his behalf, against the surgeon. If upon the injury done through negligence or want of skill - I can see no reason why the action would not now lie. An action on behalf of the servant for his injury would undoubtedly lie - why not for the master for his consequential damages.

2d ed 254.
2 Nal. 259.
1 Nal. 93.
3d ed 243

In the case of the servant entered away, a recovery had & full satisfaction obtained by the master against the servant, will bar an action against the person who enticed him.

3d ed 1345.
1 Nal. R. 257.

What acts the master and servant may, possibly, in relation to each other &c.

A master may maintain his servant in an action against a stranger, without incurring the legal guilt of maintenance.

1 Nal. 22.
2 Nal. 115.

Master and Servant

99

What acts the master and servant may justify in relation to each other &c.

A servant may justify an assault in defence of his master, because it is said that is a part of his duty. a Mol 520
Salk 207.
1 Mol 6429.

But a servant cannot justify a battery in defence of his master's child, for the right grows out of the relation to his master. Nor can he justify an assault in defence of his master's goods unless he is entrusted with them as bailee. 3 Mac 125.
Lutw 1281.

Whether a master may justify an assault in defence of his servant, is a question about which the opinions are not agreed. For say some he may have his remedy by an action for loss of service; against the wrong doer. But the person assaulting may not have property to respond. I apprehend a master may justify an assault in defence of his servant, on the ground of his interest, in the same manner as he may justify an assault in defence of his goods. For in the case the same objections might be urged that he has a remedy by action. 21 Ha 62
Salk 207.
1 Mol 6429.
2 Mac 508.
Lewes. M.
12 L. 125.

It seems cannot avoid a plea obtained from him by duress of his master. The relation is not sufficient to constitute the question of law is whether it is the deed of the servant or not. Guilty indeed might set aside such a plea, as commonly obtained. Hob 68.
3. Sess 568

104 v.

One person under the age of 21 years is ³⁴ over 11.515
denominated an infant or minor. His civil situation
respecting contracts, is very different from that of adults.

The general rule respecting contracts is that infants are not bound by their contracts. The principle of their incapacity would apply to infants before their arrival to years as discretion, and no fashion. This freedom from liability must be considered as a privilege in minors, though the danger of imposition is the ground of it. This privilege is the privilege of the infant to rescind his contract at pleasure. A vendor of land (which would otherwise be a valid contract), and without any act done by him, ^{to invalidate it} would be carried into execution, and no effect.

The following is an exception to the general rule as to non-liability. The infant is bound by a contract for necessaries viz food washing drink, clothing physician & instruction. There are the articles 8th 9th 10th 11th 12th 13th 14th 15th 16th 17th 18th 19th 20th 21th 22th 23th 24th 25th 26th 27th 28th 29th 30th 31th 32th 33th 34th 35th 36th 37th 38th 39th 40th 41th 42th 43th 44th 45th 46th 47th 48th 49th 50th 51th 52th 53th 54th 55th 56th 57th 58th 59th 60th 61th 62th 63th 64th 65th 66th 67th 68th 69th 70th 71th 72th 73th 74th 75th 76th 77th 78th 79th 80th 81th 82th 83th 84th 85th 86th 87th 88th 89th 90th 91th 92th 93th 94th 95th 96th 97th 98th 99th 100th

These are necessaries, but it does not follow that an infant will be bound for all such articles, but we must bear in mind that there must suitable & necessary for him. Thus if a widow lives with her father or guardian, purchases clothes, when his father occasionally purchases them he is not bound, because they are not necessary to him.

He is timid when he is out of the reach or protection of a parent or guardian. As if he be at a distant part of the household.

Parent & Child
Contract by Infants.

But this is not all, if ^{proper} ~~that~~ care & protection is not afforded from a father or guardian or master, the infant in such cases would be answerable for necessities. In such cases the master does not do his duty, & therefore it is necessary to the infant is answerable for articles necessary as clothing, &c. But we are not to understand that the master, parent or guardian is discharged by the liability of the minor. They are not, but the creditor may resort to either.

It is merely for the benefit of the infant that he himself is bound that he may not suffer for the want of necessities, and his parent &c shall not therefore be discharged from their liability for those necessities which they ought to have provided. In the infant would not be able to obtain credit if he were not liable himself in such cases, as his parents, guardians, &c might not be known.

But the articles must not only be necessities, and necessary to him, but he will be bound only for their value, and not to the extent of his contracts. As if he purchases a coat worth 2 dollars and paid for it, & the coat was necessary & suitable, he will be bound to pay two dollars and four pence. But if he purchases cloth altogether unsuitable to him, will he be bound? some say that he is not bound at all, others say that he should be bound to the extent of the value of the thing to him, which appears to preserve the law most perfectly.

Black 585.
Gr. 560
Litch 189.
Lough 141.

Contracts by Infants.

It is apparent from this view that the ~~policy~~ of the infant will not preserve without looking into the consideration of the contract & comparing it with his situation.

It appears to me incorrect to say that an infant is liable upon his contract, ^{or such} for in such cases as those last mentioned, the infant is not his, is the contract made by him but only to the implied contract for which is necessary to him. The real liability arises from the equity of the case & not his express contract.

It is laid down in the books that if an infant without parent or guardian of necessaries should borrow money from and expend it on those necessities, that he is liable in equity but not in law. This is absurd for if he is liable in equity he should be liable in law. In that equity ap-

pears to be right, and no decree to preserve the principle. ^{which the Eq of law implies.} The vendor of the money in Eq is considered in the place of the vendor, & can recover no more of the infant than the vendor (as the case may ~~would~~ be) would be able to recover. Salk 279
10 Mod 215.
1 Atk 168.
1 B. & W. 383.
2 B. & C. 110.

Altho the infant is liable in such cases, he may give an instrument on which he will not be liable, tho his liability for the articles purchased still remains. As if the infant give a bond for payment, the vendor cannot recover on the bond tho the infant is still liable to him for the value of the articles.

Parent & Child Contracts by Infants.

whenever the instrument is of such a nature that the consideration cannot be looked into, the infant is not bound by it. For otherwise the infant would be exposed to imposition. And the principle that he is bound and for necessities would be destroyed. So that he is not bound by a note.

An infant is not bound by a negotiable note after it has not been negotiated, for here the consideration cannot be enquired into.

But if the note remains in the hands of the promisee or is not negotiable he is bound by it for here the consideration may be enquired into.

Is an infant bound by a bill of exchange? he is not. The consideration cannot be enquired into.

Some make the objection that an infant could not be bound upon a single bill upon that principle, but it is decided that an infant is liable on such a bill, Estlin and here the consideration cannot be enquired into. So that it may be answered that this was not formerly said, and the reason why the infant was bound was that the consideration of a single bill could formerly be looked into. As it cannot now, and therefore the law respecting parent & child in that respect should have been altered to keep pace with the law. And if they have preserved the law that an infant is bound by a single bill, they do it in violation of principle.

12th 926.
12th N.D. 107.

13th 41

14th 20
15th 345.

16th 410

17th 182.
18th 410
19th 939
20th 180
21st 20
22nd 1820.

Contracts by Infants.

Another objection is that an infant is not bound by an in simul compromise & yet the consideration it is said may be inquired into. But tho' the consideration may be inquired into, yet he is not considered as capable of making up an account. But further when the law on this subject was framed, the consideration of an in simul compromise could not be inquired into & unless the first reason is sufficient for the present rule regarding infants' liability, it ought to conform to this principle. 13th. 41

En Banc we have a stat. on this subject & a question has arisen whether this stat. is in affirmance of the O.L. or not.

It seems to be a prevailing opinion here, that the stat. alters the O.L. & that an infant who has a parent guardian &c ("under his care" is the language of the stat.) can never be liable for his contracts. I apprehend that it never was the design of our law makers to alter the O.L. All these stats. contain a clause that the parent himself shall be bound by all contracts which he allows his children &c to make, & this was the object of making the stat. I conceive that the stats. are merely in affirmance of the O.L. in respect to the infant's liability, tho' the contrary doctrine received the sanction of the old Ct. of errors. A decision upon a similar stat. in New Hampshire was otherwise. Surely where a minor is out of the reach of his parent &c he ~~cannot~~ ^{cannot} be considered as under his protection.

Contracts by Infants.

The rule that the articles must be those called necessities, that they must be necessary to the infant purchaser must be strictly adhered to. Many things may appear necessary which they are not, and if such is the case the infant is not bound to the contract.

A minor is bound for necessities for his wife and children if married, for by law he is presumed to marry.

He is also liable for the debts of his wife, that is if she being an adult is married, he is bound also, provided the debts be collected during cohabitation.

It is held that the

Under the "necessaries" must be suitable to the purchaser, a question always arises what is necessary. Thus if a minor, possessed of a handsome ^{estate} ~~house~~, and wants a liberal education he will be bound by a contract for it. In the ^{case of} ~~the~~ it is said that there are some parts of learning not necessary to any one as dancing &c. but undoubtedly the change in the state of society will render those things necessary which were not so before, at least so far necessary that the infant should be bound by the contracts for them.

Certain Contracts, which minors are allowed to enter into not concerning necessities, and certain acts, which they are considered able to do.

Now suppose a minor to enter into such contracts, or do such acts, he may be compelled to perform the contract in some cases. If the contract

He 108.

Litch 29.

He 1083.

3 Falk 192.

He 108

See He 101

Ward v. 192.

Litch 44.

Contracts by Infants.

is unequal to the infant he was rescued in, but if not he is bound by it. But it must appear to be so or he cannot have the privilege.

Suppose an infant joint tenant, tenant in common or make proctor as he has to do it? He is compellable to do it in Ch^y, and if he does ^{make it} and it is not disadvantageous to him, he is bound by the partition.

What an infant is compellable to do in Ch^y if he does of his own accord binds him provided it be not disadvantageous to him.

For a joint mortgagee on the payment of the mortgage money is compellable in Ch^y to reconvey the mortgaged premises, and if he does that voluntarily, his reconveyance will be as valid and bind him as much as if it were made by an adult.

If an infant sells and delivers is he bound by it? If he does it judiciously he is, for he is bound both in law & equity to shut down. But if he has made an undivided otherwise disadvantageous to him he may apportion his privilege, & will not be bound by it.

An infant may be a trustee. But a bill of Ch^y will compell him to fulfil the trust.

3 Bur 1811
Col 177 They are
Bur 1494
1 Col 55
146 205

Here are other cases but they are all under the same principle. But if the infant is compellable in Ch^y to do an act, and he does it voluntarily and judiciously, he is bound by it.

contract. In *Infra* &c.

Suppose an executor who is a ~~man~~ discharges a debt he would be liable for the debt as a joint, and would be bound by his discharge. But an infant executor would not be bound by his discharge, as he is not liable for the debt as a joint, but if he has received the money ~~and discharge~~ he would be bound by the discharge.

10th 1899
2 June 1929
5 June 2029
100 179.
892.

Another class of cases is this

In England can enter into a contract of marriage at a very early period, a male at 14 and female at twelve. By such a contract he entered into before that age, it may be rescinded when they arrive to it, but if they cohabit together after that age they have no power to rescind the marriage.

Marriage settlements when made by minors if they are reasonable will be enforced, they are accessory to the principal contract i.e. the marriage.

in the case of this
see in the
"B. & C. 315
2 Vern 501
9 Mas. 101.

The Chancellor is considered as guardian to all the infants in the kingdom, & he is supposed to take such care of them as his discretion dictates independent of the principles of the Ed.

No definite rules can be laid down upon this subject.

In the three cases first-quoted there was the consent of the parent & guardian. And those settlements were perfectly fair & reasonable.

That a female infant was bound by a covenant to settle her estate in a marriage settlement, but it is a case a completed provision. In her was made

22. In Kustanov

A female mouse was put her down by 5th Dec 1909
accepting a pinture. This is undoubted. Dec 55.

Now it would seem from these cases that a female infant would be bound by an agreement to settle her estate, where the transaction was reasonable, and the consent of the parents or was not wanting. But there are some cases which throw some doubt over this conclusion. Lord Hardwicke says it is going a great way. Lord Thurlow says that the real estate of a female ^{infant} is not bound by her agreement until she takes possession of the money settled ^{after the husband's death} upon her; and this confirms it by her own act.

The fact is true that infant mirrors are broken in some cases, tho' the St will not hold them broken b^y the same principle always.

I cannot conceive any difference between the ^{Saccharin or Electrolytic} male and female infant in these cases but I have little doubt it is more obdurate relative to the former than to the latter.

msl
msl 68.70
low or lower

There is a ^{case} decision ~~that~~ of a male infant leasing
land, in which it is said that there is no decision
in Ex^t that a male ^{male} infant ~~is bound~~ can bind his real
estate by marriage settlement.

An infant can dispose of his personal property by will, but he cannot his real. Whether or he can do this is not determinately settled. Some say, at 12, others 15, others 14 &c — 'It is certain' that there have been decisions respecting all these

note on this
Case De Vol Confine
Dulb Co. 182.

Contracts by Infants.

There is no doubt but that the age at 14 and that they cannot under 12. By the civil law 14 years are requisite, and I take that to be the true time.

Under the rule of an infant's liability in with this question arose. An infant made his will & directed his debts to be paid, are the executors bound to pay those debts then not being for necessaries. Ch^l determined that they should be considered as legacies, and therefore paid.

At 12 a minor can elect a guardian at 14 years of age. That is a guardian however who is to take care of estates. But I find that by the civil law a male may elect at 14 & a female at 12. I take this now to be the C.L. and we have a stat adapting these provisions.

A minor's contract is generally void; ^{abs} shall after he arrives at full age and promises to fulfill it, he is bound by it. He has thus affirmed a contract which was originally voidable. In action may be brought upon the first or last promise. Great perplexity arises on this subject by the observations of the reporters.

If the original contract is void no suit can be maintained upon it, but the action must be brought upon the subsequent promise, and can only extend to the amount there specified.

^{but} the original contract tho' void may in some cases be a good consideration for the subsequent promise.

Dulbbl 74
1 Br R 55
1 Co Ca abt 282

1 Br 2048
2 Co Ca 263
1 Br 396

1 Br 164
1 Co Ca 187

Contracts by Infants

Suppose an infant leases his lands and after coming of age renunes the rent, this act speaks as strong language as any promise could, and he will be bound to the least. So if he be a lifee and pay the rent in like manner.

In all these contracts by a minor, he can always have the benefit of treating it as void, and sometimes may have his election to treat it as void or voidable, as he pleases.

Suppose a minor to make a lease against 2 vent 200 the land which will subject him to a penalty, he may treat it as void absolutely. He 878
2 vent 200
2 vent 55
2 vent 220

A poor girl made a contract to let a man cut off her hair, she then brought an action of assault & battery, and as she was allowed to consider the contract as utterly void or else she could not have asserted her privilege.

There is a class of cases in which the minor will be bound in the by his contracts, viz if a minor who is capable of fraud, makes use of his privilege as a minor merely to cover an advantage which he could not otherwise have enjoyed, and then he uses his privilege as an oppressive means or instead of a shield of defence, he shall be bound by contracts thus made, whether they be for necessaries or not.

A father was about to settle his estate and his eldest son told him that if he would not then settle his estate but let him be descended to him

Contracts by minors.

he made a gift to his younger brother £100 which was the
 value of the estate which the father intended to settle upon his younger son. But compelled the
 elder brother to pay the hundred pounds, and thus pre-
 vented him from executing the purpose of a minor to
 rescind the contract. In order to commit fraud.

The real ground on which Ch^y interferes is
 that the infant shall not use his privilege to con-

13 June 82

1 Smith on infants

14 June 82

2 B & M 251 404

4-1 Ch 251

tract a tort. The truth is that a minor is liable
 for his torts. The case of Spauld in this respect
 has been a question recently, and it has been considered
 Spauld as much a tort as against ass & battery.

There is no doubt that an infant shall
 abandon the privilege intended, or he loses it by the contract.

After all, there are instances where there was
 no marriage, settled or stated, & in which Ch^y
 have compelled infants to execute contracts, when
 they were beneficial to the infant. No rule how
 far Ch^y will go in such cases can be laid down.
 The principle is that the Chancellor acts as good
 man and uses his discretion.

18 Feb 252

Ch^y Smith & Bon. in contracts with infants
 and the infants bear the consequence of his de-
 ciding the contract.

The rules as laid down in the elementary writers
 relative to the rescinding of contracts by minors, have
 appeared to me unreasonably strict. viz. that where a minor
 rescinds a contract, he may still have all the benefit

Contracts by Minors.

which he first derived from it. The proposition is however unsupported by authority.

Altho' infants are not bound by their contracts with others the adults are bound by their contracts with them. And it is no plea for the adult to say that the other contractor was an infant, who could rescind the contract, or that the necessity to make a good contract was wanting.

So too it has always been held that if a girl an adult promises to a minor to marry, her promise is not binding. Tho' I think she should be bound for she is of age to make a marriage contract at the early age of twelve.

This minor could be the case if the contract of the minor was absolutely void, for in such case the adult could not be bound by it, it is only voidable.

In such cases ^{of marriage contracts} if the minor refuses to fulfil her contract the adult is discharged from his contract with her.

If an infant later should turn the adult free off from the bond the latter would not be bound by the contract.

Whenever the contract is avoided things are reduced to the status quo ante, the same as if there had been no contract.

So long as the contract exists the adult is bound but if the minor rescinds it, they are as they were before.

Contracts by Minors.

Edl 202-6 And in such cases the infant shall not be held from rescinding his contract to the prejudice of the other contracting party.

So long as such contract remains executory, as the infant does not rescind it the adult is bound, but if it is rescinded he is discharged, and it is altogether incompatible with this principle that the adult should not recover after it has been performed on the part of the adult.

It seems to be an opinion among Elementary writers that if the adult has performed his part of the contract, and the minor then refuse to perform his part, that the former has no remedy. They give no reason for it, except that it is considered a gift to the minor. But this principle is opposed to common sense. So that if a minor should contract to buy a horse and pay for him, & if he should choose to rescind the contract could recover back the money and retain the horse, considering it as a gift to the minor. This is the amount of the doctrine which appears to me to be opposed to principle and unsupported by authorities.

But I think that when the contract is rescinded the parties are to be as the ~~same~~ as if there had been no contract. And I take it to be an incontestable maxim, that an infant shall exert his privilege only as a shield

Contracts by Minors

and not as an affirmative action.

But what is to be done if the adult bought the goods of the minor & paid the money, if the minor retake the property without remedy; shall the adult have to recover his money. The minor is not liable to an action for tort in illiberal assumption it is said, this is true that he is not liable to this action for on a contract, but he is under it is founded on a tort or a series of torts. For the infant is liable for a tort, and I do not see why this action may not be brought as well as any other. No valid objection can exist against it.

Again nothing satisfactory on this head is to be found. It is said in some that if the adult knew the infant to be a minor that he could not recover property given to the infant on a contract which the latter rescinds, but that he could if he did not know it.

The case in *Boyd* is cited by the *Examiners* to prove that the minor is not liable for goods delivered to him by an adult on a contract, but it goes no further than to establish the rule that if he knew the infant to be a minor that he could not recover, but that was a mere error of opinion. But nothing in it with the case in *the Regent* there expressly said that if the adult knew that the infant was a minor he could recover; *See 107*

The case from *See* does not go to prove that point at all, for in this case the *Examiners*

1. Helig. 909. 912

These cases have nothing to do with the principle before us. They merely prove that the grant is not valid for a false affirmation.

As to the principle that an adult shall not receive of a minor in his contracted with him knowing him to be such, provided the minor receives advantage from it, it appears to me absurd and is not supported but by indirect opinion, given currently by judges.

There can't establish the principle that if an infant takes land and improve it till next day, that he will be liable for the rest on the contract. I think the infant can't plead his ^{improvement} against the contract. How far the ^{adult} could recover on any other ground is another question. I should suppose that he might recover of the infant upon a question of liability. But it is going too far to say that he is liable on the contract as such.

A parol promise to fulfill a former voidable contract by an infant after coming to age, makes him liable on the original contract. *an unrevoked*
The language of the writer on the subject. If the instrument is voidable, only the action is abrogated, except on the instrument or the first contract.

Contracts of minors with respect to their be-
ing void and voidable

There is great difficulty attending this
subject in the observations of the *elem^y* writers.

The authorities however are not contradictory.

I will state what I consider the correct doctrine
and to which all the authorities accord.

Contracts are divided into executed, & executory

The correct doctrine as to contracts executed by a ^{minor} ~~minor~~ ^{as the} ~~minor~~ ^{minor} which take effect by manual delivery, such ^{as the} ~~minor~~ ^{minor} as gifts, warrants personal as well as real, are void, ~~while only~~ ^{not} those which do ^{not} take effect by manual delivery are ~~voidable only~~.
 3 Nov 1854.
 This case is of
 great importance
 17th Feb 1850
 L. at 259

The opinion of D. M. in the case cited from
you agrees with the other cases on this subject

If a minor makes a gift, which is
an actual delivery, this was always held to be void-
able only, so that if the gift be entered he would
not be liable for trespass. So if a minor sell a horse
the vendor is not liable for trespass but for trover
for the recovery of the horse.

If the infant cannot have the full
benefit of his privilege he may consider the contract
void.

Suppose a minor sells a horse and does not de-
liver him, and the vendor takes the horse, he is a
trespasser, for there being no delivery the contract
is void. So too the transaction is void if the minor makes
a gift and makes no actual delivery the contract

Contracts by minors.

approves the principle that a law would be valid, in the case of a person, & says it is only voidable. He says that if the infant can not have the full benefit of his privilege without considering the law void, it shall be considered void, otherwise only voidable.

I know that it is laid down to support the rule which I am approving, that a ^{by a minor} general bond is void, yet there is no decision that the bond is void. They state as a reason that because there is a penalty, that he can rescind it at pleasure, & therefore it cannot injure him. It is a contract either executed or executed entered into by a minor, which he may rescind, and that he cannot be sued upon it. I apprehend that it is not because it is void.

There are decisions in Ex. which prove that such a bond is not considered void in that Ex.

As where an inf. ordered his debts to be paid, that a bond by Ex. ordered a general bond to be paid.

Those illegal contracts that are utterly void can never be ratified but those which are voidable only may be.

When a minor is sued upon a bond, the plea is always "infancy" & not "non est factum" as is the case with a feme covert.

The mark here is noted that the infant may if he cannot otherwise avail himself of his privilege treat the contract as void.

2 Ex. 151.
2 Ann 343.
3 Burr 1586.
Dorset 74.

1 Ex. 151.
2 Ex. 151.
2 Ex. 151.

Contracts in Minors.

1 Brk 229.
 1 Mun 280.
 1 Br 279.
 1 Br 280.
 1 Br 281.
 1 Br 282.
 1 Br 283.

by infants
 Executor contracts, are all voidable, except in cases of delegated powers, as that of attorney.)

Prime when executor contracts, which are voidable, the executor cannot be avoided.

It is a general rule that those contracts may be avoided during infancy or after infancy. So also of contracts respecting personal property executed by an infant, he may rescind them at any time. There is a case which is sometimes thought to establish a contrary doctrine, but it is not satisfactory.

But all contracts ^{conveying} ~~relating~~ to real property, as feoffment delivery of land &c are not to be avoided until after attaining full age.

The rule is that all contracts respecting personal property are voidable both before & after full age, but that all conveyances of real property by feoffment deed of delivery, &c cannot be avoided until after full age.

The reason given for this rule is not satisfactory to my mind. If an infant conveys land to himself & holds it until he comes of age, and then conveys it to another, being still a minor, and when he arrives at full age does not act affirming or avoiding, it is said that it is voidable against him, for as he enters & receives consequences was voidable at the first. Doubtless when the minor entered, the first grant was defeated at his title, so that he could not maintain ejectment against the

Co L 248. 280.
 1 Br 157.
 3 Mun 1704.
 1 Br 1508.
 1 Br 1597.

Contracts by Minors

infant. Why then could he not condescend to another?

If an infant buy a thing so he may avoid it during minority by a writ of Error;

His infancy is tried by the time of inspection.

A conveyance to give recovery by an infant he may avoid by a writ of error, but this must be done during minority. But we have no such conveyance. The reason is he cannot avoid it after full age—

If an infant will avail himself of his infancy, when sued upon a contract he must plead his infancy.

An infant is often made a defendant as in the case of jointure &c, now whenever an infant is thus decreed against by Chs, he is bound by it, with this privilege that he has 6 months after coming to age to impeach the decree. This is the case when he is deft, but if he is plff, he is as much bound by a decree as one adult unless his guardian &c has acted unfaithfully.

Co L 280

2 Bk 124.

D M 214

1 Bk 250

2 Bk 521

3 Bk 525

3 Bk 525

3 Bk 525

1 Bk 250

3 Bk 525

Parent and Child

Liability of infants for crimes & incidents for acts

The whole law of privilege is minor & protects on the ground of want of discretion. And when they are at certain such a tender age as to be incapable of discretion they cannot commit crimes. Between the age of seven & fourteen, they are capable of committing crimes according to their capacity. Before seven they are considered incapable of crime, & this presumption cannot be otherwise proved. At fourteen they are considered as capable of committing crimes, the law is not aimed at discretion, but then must be a general one.

In the period between seven & ten and th that, according to the civil law the presumption was in favor of the infant, and as to that between ten and a half a century the presumption was against him. In our law the onus probandi was upon the public in the case of the infant. I do not find that this is adopted in our law or the English law.

like
4th ed. 23.

However infants who have passed the age of 14 do not stand on the same ground with adults but enjoy certain privileges. Stat. made, which sometimes infants render them liable to the penalties, & such stat. as much as adults, if they are named in them, in some cases where they are not.

If a stat. is made imposing a higher penalty ^{act} ~~enactment~~ than was inflicted by the C.L., and infants are not mentioned, if the stat. constitutes it a higher crime than it was at C.L., the infant is liable as much as an adult.

Infants liability for crimes & civilite for torts.

This is the case where the offence is made a crime different from what it was at first. But if the stat punishes corporally an act which was no offence at O.L., if the infant is named he is liable, and otherwise he is not.

Suppose a stat punishes an offence, which was one before, & not punished at O.L., here the infant is not liable, unless mentioned in the stat.

Where the offence is not made any greater than it was before.

The minor is liable after a certain age for all offences at O.L. But if a stat makes that an offence which was not ac at O.L. & infants are not mentioned in the stat, infants are not liable. And if the stat increases the punishment without altering the nature of the crime, he is not liable unless infants are mentioned in the stat. But if the crime is rendered greater than it was at O.L. by the stat, infants are liable the not mentioned.

Statute 155.
C. 274
C. 267
337

This relates to positive acts, but the law is much more lenient when the infant neglects the duty which the law requires. In the former case he is liable in the manner stated, but for a non-feasance he is not liable to corporal punishment, unless mentioned in the stat.

Statute 10

parent & child ~~parent and servant~~

Infants of liability for torts.

In cases of confessions made by infants with the hope of avoiding punishment, they will generally be discredited, tho' not universally, as where his interest is not injured by such confession.

Liability for Torts.

It must here be remembered, that for a tort by force and arms, the minor answer is not regarded, so that the minor is liable in all such cases. This does not mean that the infant is always liable for all injuries sustained, for there may be cases in which he is not, but the subject is considered in detail. The age of seven years is not regarded in this case, an infant has been held liable at six.

It is not for every tort however that an infant is liable, for there are many in which the wrong does must be *ex tort doli*, were it not for the latter words we should say that the infant was liable for such torts at the age of six, but they say that a person is liable for slander at 14 years which we should infer that this must be the age. There is one case in that subject in which the remainder was 17 years of age, but it cannot be inferred from that case that that is the earliest age. I am satisfied that this case will not support the proposition. I should suppose that he was liable at 14 if *ex tort doli* which is presumed to be the case at that age.

May 18 29

Master and Servant. Parent's child
Infant's liability for torts.

125

It is laid down in the El writers that ^{134 324.238}
an infant is not liable for fraud in his contract, ^{120 127}
^{120 127} This does not depend upon the common law, ^{120 127}
writers the doctrine does seem to be established by these
authorities, and Corwin has thought that it was
more to late to contest it, but for some reason for
disputing it on the ground of authority.

It appears to me a doctrine destitute
of principle. The fraud is distinct from the con-
tract, tho' it is said that they cannot be separated.
There are cases in which they are separated.
Thus if one purchases property and pays for it with
the note of a person whom he declares to be responsible
and yet knows at the time to be a bankrupt, &
agrees with the vendor so that the vendor shall
take the note at his own risk. Now it is clear from
this case that the fraud is separable from the contract
and that an action for a fraudulent representation will lie.

And if it is the case that a man may be
liable for a tort committed in a contract, it seems
difficult to see why a minor cannot be liable civilly
for a fraud in a contract.

Further an infant is liable to an indirect
action for a fraud if in a contract, and if he is ^{72 Am 503}
thus liable civilly, why should he not be liable
indirectly. But if the law is settled we cannot con-
trovert it, but it has not been always acquiesced in.
If Parker and another have opposed it, on the
ground that it is bad law.

2 Nov 18

But at a later stage in the case cited to Mansfield discomfited great disgust to the principle and Lord Stenson said that to hold that an infant would be liable to an action sounding in contract, if the contract arising out of circumstances is delicate, because the infant is liable for debt.

22 Nov 22

With the support of such respectable authorities I will hazard the opinion that it is still a *questio verata*, that there are no direct authorities to that effect.

28 Nov 22

The rule laid down in the case cited is that an infant is not liable to an action sounding in tort arising out of a contract. The question was whether the tort was such as would render the infant liable. This was not a case of a fraud as the contract had not been committed after the contract. The infant was not liable for the contract. The case does not touch the principle in view which is the infant is liable to for a fraud in the contract.

A minor may be grantee of an estate and of an office, tho' not an ^{ecclesiastical} office, but a ministerial office, ^{as parish} ~~more~~. In that case if there is a condition that he shall forfeit his office on the breach of the condition, or such a breach of it, he will forfeit the office. But if there is also a penalty annexed, he would not be liable to it.

all offices granted to an infant, implies that
a man connect with diligence and skill. There is
much an implied contract, but he is not liable in
damages for the breach of such contract, but will
forfeit his office.

Suppose there is a condition ^{by implication of law} annexed to
the office upon the breach of which he it is to
be forfeited, and the condition implies in the breach
of it a tortious act, the infant is liable as much
as an adult. But if he breaks the condition not
by a tort, but by some act as usual to make an
adult forfeit his estate, still the minor would
not forfeit it. Thus a conveyance of lands is
not made by an adult works a forfeiture in some
cases, but a minor would not forfeit it.

If a minor enters into a contract for an
estate office he is not bound by the contract
nor subject to penalties. But there is an implied
contract that he will faithfully execute the
office, he is not liable in damages, tho he will
lose his office in case he fails.

He holds an estate which he forfeits by
the commission of certain tortious acts, tho he has
the privilege of not forfeiting it by certain acts, which
would work a forfeiture to an adult.

Parent and Child.

Infants are unable to execute powers.

Infants are bound by the Statute of Limitations as much as adults, without their rights are saved in the Statute.

I have already observed that an infant can hold no judicial office, nor a ministerial office if no oath be required. That is the reason that he cannot be an attorney, an oath being required in that case.

There are some cases in which an infant may be entitled to an office, which he has not discretion to perform.

And when a minor can execute an office, he is as much bound by his official acts as an adult.

In all cases where there is not sufficient discretion to perform an office to which the infant is entitled, the Chancellor in England, and the guardian of infants in this country, generally Ch. of Probate, must appoint a deputy.

There are cases in which a minor may

1 Ver 278. 784 execute a power over real and personal estate.

3 Atk 59

Now on Powers.

1 Ver 403 2b. ~~in some cases~~. An infant can never execute a power over real estate, where such discretion is to be exercised; but he may execute a general power over personal property, if he is of age to derive personal property.

Parent and Child.

When the infant is illeg.

would be his one.

I know that it has been questioned, even in those states which have not adopted the act, ~~whether~~ an infant could care one to his prochein ami. But the proper inquiry is, I think, our ancestors considered law, and whether it was established by judicial decisions, and cases of this nature become a part of our Q.L. as much as any other. A prochein ami must be one person with the infant living forth of such, but need not be a relative.

This question of prochein ami are made in cases in the infant's suit in the action by the Q.L. the execution against ^{against} the guardian or prochein ami. That one ~~that~~ ^{may} be removed out of the estate of the infant by the Q.L. who suspends them of the suit and property and discreetly brought. There are some authorities to the contrary, but the better view is that no execution can issue against the guardian. The reason is that costs are in the nature of an execution to which the infant is not liable. This is the English law. The law on this subject is found in the Q.L. then his annexed.

In different practices prevail in some of the U.S., in this state when the action fails, the execution issues against the guardian, against his estate but not his body. Most of the things, ^{as some judges} return for the inventory. ~~an execution~~ ^{an execution} must then

{ Burr 506.
1826.
Burr as guardian
of an infant.
Gillett's Law, 1828.
6th ed. 1838.
Burr 1828.
11 C. T. 24.

When the minor is ¹⁸21
sued against the guardian a prochein ami.

Suppose a guardian or next friend brings a proper and correct bill, the Ct will even then proceed to inquire whether the guardian shall be a trust-^{in fact} or a trustee. The latter case will commence a label 25-30 without permission, but the Ct will prevent him from proceeding. Such is the value of the law respecting the interests of negroes. With us there is never any inquiry made with respect to the guardian, the bill is with regard to the neglected child.

There is one case where the will does not appear by guardian, ~~then~~ unless he is joined with others who are jointly or executor, but if he be alone it is otherwise.

When the infant is defendant he must appear by guardian, minor by proctor. non est. ²²⁵
And infant wife must appear by guardian. ²³⁰
_{16th 1855}

is the an infant is not liable to escape 2 Dec 1847
from ga confinement ¹⁸ 1847, he is under d^yl. In 1847
infant is not, he has no guardian — no prison 3 Feb 1847
can force against him until he has a guardi- 160 A. 31
an. The Ct will appoint one. Here then is 9 Dec 1847
one case in which an infant may escape from
a prison if no guardian can be obtained.

the power of appointing a guardian is
incident to all of

If the surgeon has a quadrax, you must give notice to the quadrax to appear, or the suit

Parent and Child

When the minor is dft.
will fail, unless one is appointed

There are cases in which altho' the infant has a guardian, the Ct may appoint one for the suit, as where the guardian is out of the jurisdiction of the Ct.

2. J. 320.
Calu. 58.
Ct. 2 309.

If a judgment is rendered against an infant where he appears without a guardian, it ~~it will~~ may be reversed by the same Ct which rendered it, it being an error of fact and not of law, which latter would require the intervention of a superior Court.

There is manifestly a defect in the law for which there is no remedy — suppose an infant is sued ^{without his guardian} and judgment is rendered, and he then brings a writ of error coram vobis.

Suppose he has a guardian and notice is given to the guardian, the latter is not compelled to appear, this is still a greater evil, and I know no remedy for it. There is no provision in law, but our Ct have determined that if the guardian will not come, that it is no error, if he has been notified. But this is opposed to the analogy of the Ct.

There is a stat in Eng, that when an infant appears by attorney, and judgment is rendered ^{in verdict} against him that ~~it~~ ^{the} judgment will stand.

When the minor is dependant.

Another question is, *What is an infant*
as well as with others, and judgment is rendered
against all, and the infant appears to attorney
the law in the very decisions is that it is erro- R 9287
14th 1836.
neous not only as to the infant but as to all. 19th 1835
Per 184, 808.
 I see no principle in this rule — it is a case
 of a tort — not of a contract in which
 a judgment must be against all or none.
 but it is a tort in which the parties are all
 several as to the tort, they may be sued sepa-
 rately, which is not the case in a joint con-
 tract.

Our lts have decided that the judgment is
 erroneous as to the infant only, but valid as to
 the adults, which appears to be more consistent
 with principle.

The principle upon which the Court is
 founded that the judgment is joint & therefore cannot
 be reversed in part and not entirely. But in a
 judgment on a joint contract the *plffs* may sue
 one party for the whole. But these judgments are
 not always strictly joint judgments, for the verdict
 often renders the penalties proportionate to the
 agencies of the different offenders.

Parent and Child

Law with respect to legitimate & illegitimate
Children.

A legitimate child is ^{born} one born in lawful wedlock, at a competent time of life. This is incorrect. An illegitimate child is one begotten & born out of wedlock.

The first definition is incorrect, for a child may be born in wedlock, & yet not legitimate, as if the husband could not have had access to the wife.

The second definition is incorrect, for a child may be born after the husband's divorce, and not illegitimate.

It was always admitted that a child might be born in wedlock & yet be illegitimate, but the method of proof rendered it impossible to make a child illegitimate. If a man had been confined to a dungeon for years & seen no one but the jailer the law could not admit this proof. This ridiculous practice is now done away.

So also if the husband was with his wife during her pregnancy, the child would have been considered his, tho' he had been absent a number of years and his wife was delivered a day after his return & so of similar cases. But all these practices are now done away. So that illegitimacy may now be proved as any other fact. What the law formerly was, & what it is now, will be seen by the authorities.

5 B. 96
2 B. 920
1 B. 122
6 B. 122.
Co. L. 244.
2 B. 395
4 B. 211
1 B. 311
Co. L. 574

Legitimacy & Illegitimacy

All marriages that are void ab initio by the law, render the issue illegitimate. Not all marriages are void ab initio that appear so.

In those marriages which are annulled by a divorce for causes arising after marriage, the children are not bastardized by the divorce. The children are not bastardized when the marriage is void ab initio, untill a divorce is had. Now if I don't all marriages within the Levitical degrees are considered, as never having taken place, so that of course the children are illegitimate. Bo 2205
1808460
255-5.

If a man marry a second wife, while the first is living, the children by the second being bastards, cannot inherit his estate, & if he has no issue by the first, his next relative will take his estate. This is productive of many evils.

A second marriage does not require a divorce to make it void being so absolutely ab initio.

There are some single rules of evidence relative to illegitimacy which do not fall under any general rules of evidence.

A rule is never a lawful witness to prove that her husband never had access to her. The reason given is that it is contra honorem, or her tilgine such evidence. The reason would be satisfactory, if the rule were consistent, but she is admitted to prove facts confirming her incontinency, which I should suppose equally a ~~or~~ contra honorem.

Parent and Child

Legitimacy and illegitimacy

The wife is permitted to prove the time & place of the child's birth, and thus circumstantially prove her incontinence, or prove the illegitimacy of the child.

May 594
1842 2nd
Ch. C.

The civil law legitimates the children born before wedlock if the parties afterward intermarry, but the C. L. is otherwise. Some of the states have adopted the civil Law by statute. Nor do I think that domestic tranquillity would be interrupted by it. An objection is that it would tend to ~~the~~ increase unlawful cohabitation. Doubtless this but if it would the objection is powerful.

May 595

The declarations ~~respecting~~ of the parents respecting the legitimacy or illegitimacy of their children, may be proved after their death, tho' not while they are living.

Is any evidence that they may have given in ~~Ch. C.~~ by which they have admitted the illegitimacy of their children may be proved after their death. This being so death is not fatal to the same objection as the admission of their past declarations.

June 494

A inscription on a tomb stone would be admitted to prove the time of marriage birth and so.

Legitimacy and Illegitimacy

A divorce is granted, there does not dissolve the marriage, for a legacy being made he refused to him, and he has no right to her person.

If a child be born in such case, the presumption is that the child is illegitimate, but being a presumption of fact, will be rebutted by evidence.

Suppose there is a voluntary separation, 2 D.R. 385, by articles — a child is born — the presumption is said to be that the child is legitimate, this seems to me almost as a presumption — but I suppose principles of policy dictated. The rule throws as many obstacles in the way as possible to prevent separation. But this presumption may be rebutted by contrary evidence.

In most countries, the civil law has been adopted.

The rule with respect to the illegitimacy of children born after marriage dissolved is that if it is born after the usual time of gestation it is a bastard — but which is generally considered as such, and some circumstances may render it larger. And the rule is subject to exceptions, when the law gives it to make them from the opinions of medical men.

But that the rule should be universal that the child is legitimate if born within that

138.

Regularity and Efficiency.

Legitimacy and Illegitimacy.

B. 2. 125.

vol N^o. 114

time is reduced to equal inconvenience & labor.
See.

Hei.

1 Bac 512

Bl. says
the ~~off~~
child may
choose
vide
Bl. C. 457.

244

Dec 4/9

1 Bal 104

The wife marries again after the death of the husband, and a child is born according to the child according to the rule ^{it} belongs to either husband. Here the rule laid down is that the wife may choose, which husband shall be the father. Another singular rule is that were a child is born before marriage and is thus a bastard, and the parties afterwards marry & have a legitimate child, that if the bastard child enter upon the estate ^{even} in a same share, the legit and the illeg take it the father has said, the legitimate child nor his issue can inherit of them dispute the legitimacy of the other

An illegitimate child can never inherit from any one. For a person to inherit must be of his blood, a bastard cannot be, he is filius nullius, & related to no one. This makes to the whole extent that it will go is absurd.

Bank 265

1. L. Hev's

A bastard can inherit neither from his father nor his mother. But ^{the maxim} is introduced for many useful purposes. It was introduced, formerly in part on the anxiety of the State to secure domestic tranquillity, and to promote illicit commerce. For if a man should have a legitimate child and then marry and have illegitimate children, it would occasion great un-

Legitimacy and Illegitimacy

to admit the illegitimate child to the exclusion of the next next, their union their common law son or daughter the father, or mother never marry after, and conduct not the child inherit. The will exists to supply a kind of necessity in order to prevent illicit intercourse. As if the parents after matrimony.

On these considerations some of the states are altered the R.L. by laws.

As the bastard cannot inherit from his father so no one can inherit to him but his children, for according to the maxim that he is filius nullius, he has no other relatives. To establish relationship we must trace it to a common ancestor but a bastard is considered as having none.

But his situation as a purchaser is somewhat different, tho still very different from that of other persons. He can take by his assumed name & not otherwise. As if an estate be given to the eldest son and if a bastard son be a son, he cannot take, for he has no name, and he could not even if he had no other child & the donor knew of it, still the illegitimate child could not take in by the title of son, child &c. &c. He must be mentioned by his assumed name.

There was a contingent remainder here to the eldest son of J. if legitimate or illegitimate. 20 L. 2. 60 R. 60. 10. 60 529

Parents and Child.

Legitimacy and Illegitimacy.

Now the eldest son if illegitimacy could not take, he must take if at all at the moment of his birth, but he has not at that time acquired a name by reputation, without which he cannot take.

It has been considered that much more station to the child of a woman is good, because at the moment of his birth he acquires a name by reputation ~~at the moment of his birth~~ as being her child. But here another objection is urged that the probability of her having an illegitimate is too remote. But this objection is on a totally different ground.

side
more & c.

On the case in *Mar* it is said that a devise by the parents to an illegitimate child is void, and the denomination children.

But Allen says it is not correctly stated, by *Mar* so that it was when there were no others to take.

But I cannot see how this can be according to the common Law, for it may be ever proper in itself. Hence the civil law they should take under the term children. The ecclesiastical law I am inclined would lean to this side, and it would be proper to state.

Settlement of the child

The maxim that an illegitimate child is
filius nullius, is the foundation of the rule that the
place of his birth is the place of his settlement.

Salh 129
1936 30 2.451

Some of the States have determined to
start the settlement of the matter in the settlement
of the child. This has been so decided with respect to
the child, and the decision is acquiesced in.

But in the rule of G. & L. there are exceptions. If the mother is sent from one parish to another to jail, and the child is born there, the child is considered as having his settlement in the parish from which the mother was ~~sent~~ sent, not on the ground that it was the mother's settlement, but because, the child so conceived is born in the parish where born there. Otherwise a burden would be thrown upon the identity town.

If any Guard has been purchased for a parish in sending the mother into another parish in order that the child may be born there, the settlement of the child will be in the parish from which the mother was sent. But the Guard must be in the parish, for if done by an individual not for the parish it will not have the effect.

Another exception is, "a woman should
be so vigilant the child is settled where it is born."

Parent, & Child
Settlement of the Child.

suppose she is apprehended under the Vaccination Laws in order to send her home the child will have its settlement ^{to} her so parish where they are sending her for if she had staid at home the child would have been born there & is so considered.

But this is without any reference to the mother's settlement.

A child during its infancy of nurture which is till seven years of age, cannot be removed from its mother. If then the mother have a proper child illegitimate and so to another parish & there obtain a settlement the child will

1836 459

1836 121

must go with the mother, he will not acquire a settlement there, the father is to support him, but they will have a claim upon the parish in which he was born.

that an illegitimate child is settled in mother's parish

This maxim does not hold in cases of marriages within the Parochial district nor in other cases where the consent of parents is necessary.

A man no more can marry his illegitimate sister than he can a legitimate one, nor marry an illegitimate child without ^{the mother's} consent, where it is necessary, ^{in the case of illegitimate children} now, the maxim of nullius filius extended thus these cases they would be absurd. The ecclesiastical Courts are overruled by the Civil Law, which knows nothing of this maxim.

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Maintenance of the Child.

The principle of the Civil Law has been introduced into the Eng Code of jurisprudence by the Statute.

The putative father & mother are bound by Statute to maintain the child in England and Stat 92. These states have been differently qualified and applied in the different States.

In the Eng Law the mother cannot compel the ~~and~~ father to maintain the child but this is always done by the parish officers.

If the child is a pauper the public must maintain it if the parents are able they must mutually contribute to it's support.

The present maintenance of the child is incumbent on both, but the contingency of his becoming a pauper must be provided against by the father alone, & he will be compelled to render himself responsible for his future maintenance if the child should hereafter become a pauper. This principle is carried into execution in various manners, In London the mother may compel the father to & ensure her against future liability, in other places the justices or overseers of the poor carry the principle into effect.

The mode of proceeding is that a woman when pregnant with an illegitimate child, ~~she~~ makes a complaint to a magistrate declares on oath some one to be the father — a warrant issues — and the magistrate determines whether there is any cause of action — if there is it is referred to the court competent to try the case — On the trial the jury ~~the~~ ^{the} juror ~~is~~ ^{is} the prosecution, gives testimony but such testimony is not conclusive it is open to investigation & the deft may disprove it. The process is criminal tho' the Court is a civil one being for money.

It is objected that it subjects a man to great danger, but if there were no such risk the woman might often suffer greatly. And her character is generally known.

In order to entitle her to recovery, she must declare who the father is during her life. This is provided by stat and indispensable, no evidence is valid against the want of it — not even the deft's confession. She must also be uniform in her charges both ⁱⁿ before & out of Ct, before & after the birth.

The Ct sits for four years, and divides it into sixteen parts, and an execution issues every quarter.

If the child dies in that time the

Maintenance of the Child

execution is stopped. If the expense of the maintenance of the child is increased to such an extent, that it will compel the father to increase the allowance. If the child is still born, or there is more, the father is discharged.

If the mother having this right married, it has been a question whether her husband could have the right enforced, but I do not see how it could ever have been questioned, it is a right which she had by the law of the land and she and her husband undoubtedly may have this right enforced.

And ~~that~~ if the putative father is discharged how will the child be supported, since the mother is liable to support it only half the time. The position I consider altogether unsound.

If a mother of an illegitimate child does not prosecute the putative father — in such case he not being known, the parish will be obliged to support the child, without an imbursement — here the selectmen or the overseers may sue the father & thus compel him to reimburse the parish.

A question has been agitated whether on a prosecution by the overseers, the mother was compellable to give testimony. In England it was decided that she was so compellable.

Parent and Child.

The duty of parents to support minor children.

It is true on the ground that the rights of the parish could not be otherwise enforced. I am not satisfied with the decision. I am not feel satisfied that it is a matter of so much importance to secure the contingent rights of the parish. It may be productive of great evil in disturbing domestic tranquillity. It is merely a question of policy, and I think that there are stronger reasons against them in favor of it.

When the mother has died before the majority may be adduced after her death, as in the case the overseers prosecute.

The duty of parents to support minor children.

In the 3d this is said to be founded on the law of nature. The law has decided the time to be until the child arrives at 21 years of age. This is an indispensable duty of the parents. At the expiration of that period the parent is discharged from all obligation to support the child unless he is unable to support himself.

The parent cannot discharge himself of this obligation on the ground that the child has property of his own sufficient. He is never discharged but when ~~he is~~ ^{he is} considered a pauper.

Parent and Child.

Duty of parents to support minor children.

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But the child be the worth ever so much money, enter into contracts for no business for which he would be bound, the father is liable.

The child's being able to support him self, will not discharge the father from his liability to maintain him according to his rank.

I am & was decided in favor of this effect. The child of a wealthy parent was driven from his father by cruelty, and received from another a liberal education, the latter recovered from the father the whole expence thus incurred as far as possible.

If the child is an adult, the parent is bound to support him, provided the child is unable to support himself. This is a provision by statute, and I believe the stat is adopted in every State in the Union.

The law that grandchildren shall support their grand parents exists in some of the states.

As it respects the duty of parents to support adult children, and children to support parents &c several theories are to be observed.

In the construction of the stat I have remembered that when the parent is able to support the child no aid is to be called for from the grandparents - and where the child is able to support the parent no aid is to be called for from the grand children.

The parents, grandparents, children and grandchildren, must support according to their

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ability. The ability is the criterion of these limits so that if one child has more property than the rest but a much larger family, & both will be taken into consideration.

The English Statute has been adopted with some variations in most if not all of the States.

Some questions have arisen in cases of this kind, a man marries a wife having children. The mother is not bound to maintain them. ^{if they have property, the father} The husband is under no obligation to do it, ^{if they have property, the mother} if they have property of their own the mother need not maintain them, but if they have not, the husband takes upon himself her obligations & must support them. But this obligation ceases with the coverture.

But there seems to have been a received opinion, that if a man marries a wife having children, that he is bound to maintain them, even if the mother was able to maintain them. But it is incorrect. His obligations are no more or less than hers were, and as in some circumstances she would not be liable to maintain them, the husband would not in such cases be bound.

I do not suppose that the husband is bound to support them when they cease to be minor.

Children's duty to support their parents

All the children male or female are liable to support a father or parent according to ability. If then a daughter is liable to this duty, namely, it has been determined that her husband is not liable. So that the sons in law are not liable, it falls upon all the rest of the sons & daughters.

This is manifestly absurd to the principle that ^{the 190.} a husband takes his wife cum onco, but it is founded on principles of domestic tranquillity. ^{2 Paulist 245}

The mode of enforcing this duty being founded in fact is different in the different States. The success of the law are those who may be to the enforcing of this right, tho' nobody any one may do it. And the different States the different States are founded upon in states.

The mode of proceeding must be nearly the same every where — All the parties are brought before the court to show why they should not be obliged or why the husband should be exempt, if they prove that they are unable to contribute they are discharged; and the appeal

there fixed upon may be after altered in a change of circumstances. In case they are obliged to do so, they pay, execution issues quarterly or semi-annually, according to the state.

There is a general law which grows out of the state — It becomes law — There are three persons in the man and mother. Both take no care of their father tho' his wealth takes

Parent and Child
Miscellaneous rules

all the care of him, and is unwilling to apply to the Ct to enforce the duty of his brother from motives of delicacy, so, suppose then that some one else undertakes it

the fall

The father, as parent has no right over the property of the child, tho' as natural guardian he may have the care of it, and act in many respects like any other guardian.

A minor is as capable of acquiring property as any other person except by his services.

The avails of the service of a child belong to the parent, & he can no more give to the child, the property which he has earned to the prejudice of creditors, than he can any other property of his own. The child in this case is regarded as the servant of the parent.

Where the infant is beaten by which the parent has lost his services, or been put to expence he is entitled to an action per quod servitium amissum. The recovery for the pain inflicted so belongs to the minor & not to the parent. The expence incurred by the parent must be allowed in the declaration as well as the loss of service, if he wishes to recover that.

So if a child is enticed away from the

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Father's right to recover for the debauchery of his daughter
parent he may maintain an action for loss of service. 17 M. 29
I have no doubt myself that an action would lie
in such case, without averring loss of service. The par-
ent is prevented from exercising the duty of a parent
& from giving the child the education he wished to.

A father is allowed to recover damages for
debauchery his daughter on the principle of loss of
service. But the loss of service sinks into nothing,
when the parties are brought before the Ct. & is nev-
er attempted to be proved. The real ground for dam-
ages is the disgrace of the family, & the wounded
feelings, which the debauchery has occasioned —
The plank on which the whole rests is loss of ser-
vice, however. Hence the mother brothers & whose
feelings have also been wounded, are not entitled
to an action. The damages recovered are proportion- 17 M. 24
ate to the rank & feelings of the family, & not to the 239. 285
actual loss of service which has been sustained. 17 M. 239.
Service will always be presumed & is not required to
be proved.

And the father is entitled to an action after
the daughter's minority has ceased, if she contin-
ues to live with him for she is then a *servant de facto*.
But in a case where the daughter did not live with
her father & was not within age, the father was
held not to be entitled to an action. But if I was
to meet with a declaration, where the *per quod* &c
was omitted, I would endeavour to defend it, in
a court of justice — for I do not believe that to be

Parent and Child

continued.

Becke 55
2 N. L.

the real ground of recovery. It is immaterial whether a minor child is living with her father or not. She is entitled to her services. — Suppose the daughter an apprentice bound out to a master. Can the father maintain this action? He can. But if the gist of the action is the loss of service he certainly could not, for he was not entitled to her services.

The master to whom she was bound, could unquestionably maintain an action *per quod*.

If the parent is dead, I should apprehend, that the person who stands in loco parentis may maintain the action.

Suppose the father is living at the time the injury is committed & dies before action brought, who is entitled to the action? Is any one? This question is now depending before our Court.

3 Dec 18
18. N. 185.
6 Bar 578

In this action the daughter has no interest in the event of the suit, is allowed to be a witness. Indeed, she was admitted before it was settled that interest in the event only, & not interest in the question, should exclude. She was then admitted *ex necessitate rei*.

2 L. N. 1002.
18. N. 558.

In England the form of this action has been prescribed in 21 Ann. In County cases has generally been brought *per quod* in 21 Ann. doubtless will be, when there has been a breaking of the house of the father, & the detainer of the daughter alleged by way of aggravation. But case is more convenient than *per quod*, for in the latter case, if the entry in the house can be justified,

Parent and Child.

Settlement of Children.

So that such devise may by possibility not take effect until 21 years & a month after the parent's death.

The old distinction & requirement decides the minor infants viz whether they were intended to take effect in present or in future are now at an end, and the law have now greatly determined, that it can never be the intention of a devise, that the infant shall take before he is born.

Re Sh. 50
10 W. 240, 242

It has now become very common for parents to come out of their estates terms & so years to be raised portions for younger children. If the law pays these portions the law is at an end.

Settlement of Children.

This subject is in a great measure regulated by statutes in the several states. To understand these it is necessary to be acquainted with the common law.

Every person born in a country has a settlement somewhere. It was formerly decided, is before the revolution, whether a child gained a settlement by birth in a state where its parents had none.

But it is now a rule, that if the parents have no settlement within the U. S. the place of the child's birth is his settlement. But if the parents have a settlement, the settlement of the child follows that of its parent.

If parents from N York remove into Penn^a where acquiring a settlement, a child is born, the settlement of that child is his father's settlement in N York.

Settlement of Children

If the father has no settlement, the settlement of the mother is that of the child. The last settlement of the father is the settlement of the child.

If a woman marries a man who has a settlement she gains one by the marriage. But if the husband has none the wife does not gain any.

Birth always gives a settlement unless the parents have none.

Persons who go to a place where they have no settlement are liable to be removed by the officers of the house where they are settled. This is the case unless a foreigner who has no settlement in the country cannot be removed.

The husband & wife cannot be removed from one another to prevent one of them from gaining a settlement. Neither can master & servant be separated. It has been decided that persons who cannot be removed do gain an account of such relation no settlement by commorancy.

The former decisions seem to have proceeded upon the principle, that the mother's settlement was preserved by the coverture, till the husband's death.

The maintaining parent gives the settlement to the children. If the line with the mother & one maintained by her, she gives a settlement for them, by gaining one for herself. But if the one maintained and maintained, when she gains no settlement, her gaining a new settlement gives none to them. But if the father were living and gained one the rule would be otherwise.

Parent and Child Settlement of Children

When children are maintained by their own proper-
ty the mother's gaining a new settlement gains none for
them any more than a guardian's gains a settlement while
he gains one for his ward.

Suppose the mother marries again, & removes to
her husband's place of settlement, the children by her first
husband gain no settlement by the mother's marriage.

4 Car. 410.
2 Salt 257.

But if any of them are under 7 years of age
they cannot be separated from their mother, but must
be maintained in the town where she lives at the ex-
pense of the town where they are settled.

If the husband of the woman is bound to
maintain her children by a former marriage, I apprehend
that they would gain a settlement in the place where the
mother is settled. If the mother were able to maintain
her pauper children by her former husband, it was her
duty to support them; & duties due from the wife at
the time of her second marriage are assumed by the
second husband.

A minor child gains no settlement by be-
ing with a guardian, nor is town' by living with
a master.

7 Car. 325.
5 B.R. 550.
Nym

An old settlement is always lost by gaining
a new one.

Suppose children to have arrived at the age of
21 years; Can the father by gaining a new settlement
or himself gain one for those children? This depends
upon the capacity in which the children receive

Settlement of Children.

with the father. If he lives with him as hired servants, or as boarders under a contract they gain none; but if they live with him as children they do gain one.

Suppose a minor marries, & takes the father as gains a new settlement for himself, the settlement of the child at the time of the marriage, continues to be his settlement. So if the child enlist in the army, as withdrawn from the protection & authority of the parent, the gain of a new settlement by the parent gains none for his child. He then ceases to be the maintaining parent &c —

It is not the duty of any particular town to be at the expence of maintaining an able. But it is their duty to provide the immediate relief for him, & present the account to the legislature &c of the State, who are finally to bear the burthen of his support.

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Guardian & Ward.

There are a great variety of guardians, in the English law; some of whom not being known to our law, it will not be necessary to notice. Of this class are guardians in Chivalry, whose office ceased with the abolition of military tenures by stat. 12th '92, so that they now no longer exist in England.

Guardianship in Socage devolves upon the next kinsman of an infant under 14, to whom an estate of inheritance has come, to which this guardian can never have any claim by descent. But as in this country all relations may in most of the States by possibility inherit, there can be but few instances here of guardians in Socage.

A guardian by statute is the father (if there is one) or mother, or next of kin to the heir of an estate.

Guardianship by Mortgage can never exist here because "as all children may be heirs, all are provided for, by Guardians by Statute."

Testamentary Guardians are those, who are appointed by will under the stat. of distributions.

But our Jrs. of Probate are not bound to follow the choice of the testator.

The judge of Probate here stands in the same situation with regard to minors, as the Chancellor in Eng.^d

A guardian is a person who has legally the custody of a minor, where his father is deceased. The infant is in loco here denominated a ward. It is true that the father some times stands in the situation of guardian, & is liable to the duties so, but the definition given above is conformable to the general acceptance of the term. Sometimes one

Guardians and Ward.

person is guardian to the person, and another is the estate.

Bl. & S.
Blanc 458

Guardianship by Locage devolves on the next of kin, who can by no possibility inherit the estate of the infant holder in Locage tenure. Provided there are equally qualified, there is no difference between the next of kin and half blood. If several persons are next of kin male, all prefer to females & the eldest brother to the others. In all other cases there is no preference, he who gets the minor into his hands is entitled. Guardian in Locage is guardian as well of the person as of the estate.

Blond 292.
2 Mac 587.

Guardian in Locage can never resign his guardianship. At 14 the guardianship ceases, or the infant's demand, his estate & electing another.

Guardianship in Locage can rarely exist in this country. But it may in some instances. - as in the State of New York under their stat. by which estates can only descend to those, who are of the blood of the last purchaser.

Guardianship by nature is much more extensive in the U.S. than in Eng. Only the heir apparent in Eng. is the minor of other guardianship, & not the daughter, if there is no son, because a posthumous son may by possibility be born.

The father while living is always guardian by nature; after his death, the mother, & then the next of kin.

In the U.S. all the children are heirs, & therefore guardianship, by nature extends to all.

When the child comes to the age of 21, if the

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father is dead, the child has an election. If the mother is dead & the next of kin do not assert their right, the Ct of Probate must appoint a guardian.

Guardianship by Public Law is one which in Eng^d extends to the pauper children only, & not the heir. It is here superseded by the guardianship by Maternal Testamentary Guardians, are those, who in Eng^d are allowed to be named in the last will of the father or the guardian till the age of 21. It extends to the person & the estate. This sort of authority, the father's election has been adopted in some of the States & not in others.

It has been a question whether a minor father or mother by deed elect a guardian for his children. MS 462.

I apprehend that as the deed is not to take effect till death, it will then be considered as a will. MS L. 39.

This guardianship supercedes all others, & can never be assigned to another.

This guardian like all others, is liable to be removed if he should become an improper person.

The minor may often elect his guardian - MS L. 38-9
as where he has no other guardian and has arrived at MS L. 39.
the age of 14.

Guardianship by nature does not preclude the infant's right of election. This election is made before those who have the management of testamentary matters. The Ct must exercise a sound discretion as to the propriety of the choice.

Guardian and Wills.

A male infant can never elect till the age of 14 - & a female certainly never till twelve.

The power of a Ct of Ch^{ty} respecting guardian in Eng^d is very great, & is derived from the royal prerogative, by which the king is father of all the kingdom. The powers of the English Chancery are here exercised by our Ct of Probate. If the guardian be comes bankrupt, bonds are generally required of him to act with fidelity.

The Court of Chancery in Eng^d is not vested with the power of choosing a guardian, but only of rejecting an improper choice - & in that case Chan^{cy} will appoint one & so may our Ct of Probate, if no choice of the infant is approved.

Guardian ad litem is where an infant is made defendant, who has no guardian, & one is appointed to defend in that case by the Ct. In a criminal case the Ct are the guardians & none is appointed. In the State of New York, Jersey the Ct did appoint a guardian in such case for an infant.

It has been questioned whether a mother can be removed from the guardianship of the person of her daughter but I know of no law which prevents in the exercise of such a power may often be extremely proper. Till removed & apprehended, the mother is natural guardian without appointment by the Ct of Probate. It is of some importance to ascertain whether the law does give the guardianship to the mother without

Don. Guard^r
Co. Litt. 89.
2 Inst. 246.
1 Br. P. C. 552.
12 W. 700.
8 Mod. 214.
9 Bro 276.
11 Ves. 380.

14 Bro 146.
3 Hall 335.
1 Trin 1496
Not certain that this
should be Don.

Co. L. 89

"The father
cannot

without appointment

If the infant is under the age of 14, the Court in appointing a guardian for him do not summon the infant to appear - for he has no choice.

An infant ward having no choice father or mother may live with his guardian & gain no settlement. He would be otherwise if he lived with his father as guardian. The father cannot be removed from the guardianship of his child's person, & care of his property.

When the Ct appoints a guardian for an infant under 14, he has his election at that age. Does the guardianship of the person appointed by the Ct expire at that age? It does not unless a new guardian is elected by the infant.

The guardian must always give bond, for the faithful discharge of his duty. Of testamentary guardians no bond is actually required.

The guardian may be compelled to account ^{2 Mar 1777} from year to year before that Ct which has the appointment of guardians.

At Ct the action of accounts was the usual one resorted to in those cases; but it is now superseded by a Bill in Equity in all the states except in Conn. Co L. 83.

Cts of Ch^o may compel the production of books, papers &c and put the guardian on his oath.

The action of account is removed in Conn. by stat, as remedial as a bill in Ch^o.

The Cts of Probate have sold Ch^o in Eng. & exercise the power of removal for causes which justify

Guardian and Ward.

1 M. 400.
Nov. 180
Feb. 44.
2 Feb 177

The guardian for the trust which has been reposed in him. Bankruptcy alone is not a sufficient cause for removal - bonds with surety are required for the safety of the ward.

The guardian (except a father) is not bound to maintain his ward at his own expence. But if the ward has property, he must provide for his maintenance.

1 M. 41. 287.
1 Dec 180
2 Dec 360.
2 Dec 107. 285.
3 Dec 899.

The father however can never be reimbursed from his child's estate for expences in the procurement of such necessaries as he was able to furnish.

A Guardian can have compensation for any extraordinary trouble so to which he has been put.

A mother who is guardian is not obliged to maintain her child if he has property.

We have no stat in trust giving the guardian authority to reconvey mortgaged lands or pay out by the mortgagee. A minor has himself authority, & can make a valid conveyance in these cases if old enough to do the corporal act.

2 Jan 290.
2 Feb 245

The guardian can reap no benefit from the use of the ward's money. It is at the election of the ward himself to take all the benefit, which may have been received from the use of his money.

If the ward has property in cash, it is the guardian's only to put it out on good security. He may take the money himself and repay the minor the principal & interest. Suppose the guardian should pay a debt due from the ward's estate three years hence at a discount, the minor bears the loss.

bit of this discount. The presumption always is that the guardian has the ability to put out the money on good security at interest.

The guardian has no authority to purchase real estate in the ward's name with his money. ^{Sec. 405} If he does, the ward on coming to full age may elect whether he will have the land, or a return of the money with interest.

~~The guardian has no authority to purchase~~
If he refuses to accept of the land, the ward is trustee ~~for~~ the legal title for the guardian.

Suppose the guardian should put the ward's money into trade. The ward may elect on coming to full age to take his money with the interest, or to receive the profit of the trade, deducting the expenses and trouble of the guardian.

If the ward should die without making his election, can his heir elect. This property in the hands of his guardian is personal & vests in the ward's executor, who has the right of demanding the principal & interest. The heir cannot elect to have the land & thus defeat the claims of creditors. The title to the land vests in the heir, as a trustee.

Suppose personal property, not money, of the ward, comes into possession of the guardian. He ought to sell it & pay the debts of the ward & stop the interest generally. But it is not usual to sell plate, watches &c. &c. Every thing of a personal nature ought certainly to be sold.

Guardian and Ward.

Where the minor was nearly of age, and a farm well stocked had descended to him, the guardian refused to sell, the Ct held that he was justified in not doing it.

Call 58
18th 552
18th 180.
2d 11/12.
3d 514.

The guardian has after power to forbid the marriage of the ward, & Ct of Ct's will often enjoin them from proceeding without the guardian's consent.

Ct's of Ct's consider themselves as paramount guardians.

See 187

If a female ward marries, the guardian's power must cease. Suppose she marries a minor. He being allowed by law to marry has as much right over her person and property as any other husband, & the guardian has no farther control.

Suppose a male ward marries. He has contracted a relation wholly inconsistent with the guardianship of his person. But the marriage does not disturb the relation of guardian and ward as far as his property is concerned. The power of the guardian is extended to the property received from the wife.

Addenda.

2d 10th 126. 55.

2d 10th 55.

See

2d 519.

A testamentary guardian it is said cannot make a lease of his ward's lands. Neither can a natural guardian.

A mother cannot appoint by will a guardian for her child - for the stat extends only to fathers.

Guardian and Ward.

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Application was made to appoint a guardian to, ^{Verz. 184}
a female infant after marriage - but they refused.

A guardian may purchase land with the ^{1841. 10. 5}
permission of a J. of Ch^o, but not without it. ^{4. 25.}

If a guardian commit waste, an application
by prochein^o Ch^o will grant an injunction.

The Reg. J. of Ch^o have considered it a
contempt for any person to marry a ward without a L. ^{25. 11. 11.}
in the consent of a guardian of their appointment. ^{31. 2.}

If one is sued as guardian, and wishes to deny
his having been one, he may plead it either in abatement
or in bar. If he ever has been guardian he must state
the time & that he fully accounted, & was discharged, &
never acted as guardian afterwards. i. e. & never was one
before that single appointment &c

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1 This rule would be taken as applied if it were he has no
original jurisdiction out of his own county.

Sheriffs and Factors.

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The word ^{which} ~~shariff~~ is derived from the
same word which a ^{man} ~~man~~, and in English are synonymous
with the governor or keeper of the county. As a
shariff is meant then the governor of the county.

By the Eng. laws ~~1802~~ ¹⁸⁰⁰ it is provided that the chief shall hold his office for one year 1802 only, but it is often said that he may hold his office during the pleasure of the King. ¹⁸⁰²

In Iowa the sheriff is appointed for each county by the governor or council of the state ^{last Aug} and holds in office during their pleasure. His office then is determined solely by death, removal, or re-election.

Every sheriff must reside in the county, & be c. 235
over which he is appointed - for he has regularly
no jurisdiction out of that county.

The general rule then is that the sheriff has no authority out of his county — but if while Mac 2, 95 ^{acting as such} he is engaged in an official act, he has authority out of his county for that purpose.

Esca. Of the sheriff's prison in the
county of A. escapes into the county of B. he has
a right to retake him in B. that being but a
jurisdiction and continuance of his local au-
thority. And so of many other cases.

From this we perceive that the exercise
of authority on his counts, is to give effect
to those ~~former~~ acts which are begun in his own

Sheriffs and Sailors

Deputies
County.

Every thing was at O'Land's ^{by} command, men
appoint Pelepias and under servants, who may
execute all ministerial offices

Sept 13.
Feb by 240

All ministerial offices are ~~to~~ now
be performed by deputies.

As a part of law the sheriff cannot appoint a general deputy without the approval of the county Ct. But a sheriff of one county may appoint the sheriff of another county his deputy without the consent of the county Ct. He may always appoint a special deputy without such consent.

A deputy being the mere agent or servant of the sheriff is removable at the latter's pleasure. But while he remains in office, his general powers cannot be abridged by the sheriff.

Oct 13.
Sat 90.

For while the deputy remains in office the law requires that he should perform all the duties appertaining to that office.

Wonder who shall call on the Count, the
 Hon govt. or ^{as it is usually called} the Ex of P.M. may give
 us a hint or forewarn through a debate between.

Each 96.
Box 65.

In Eng. the deputy, acts officially and, in the name of the sheriff, so that upon the return of a writ to him, it is not signed ⁱⁿ his name, but in the name of the sheriff, because by the P.L. the deputy is not regarded as a known public officer, but as a servant of the sheriff.

Sheriffs and Deputies.

175

On Court on the other hand the sheriff's deputy is regarded as a known public officer and his official acts are done in his own name & not in that of the sheriff. Lib. 24. 212.

But it has been determined that if ^{he} a writ ~~was~~ directed to the sheriff only, the deputy may execute it in his own name. 22. 237.

A covenant by the deputy sheriff with the sheriff not to execute process of a certain description is void - it is the duty of the deputy to execute all the duties of his office. Holt 14. 4 Mac 288-9.

The deputy sheriff being himself but a servant cannot delegate his authority to another.

It is a general rule that delegated authority cannot be delegated over.

It follows then that a deputy can exercise his authority in person only - This rule however does not prevent him from demanding or receiving assistance to execute his authority. 1 Mac 282

A deputy may empower another to do a particular act in his presence - The meaning of the rule is that he cannot make over an assignment of his power. 2 Ld 90

I find it laid down in M. that an arrest by the abstant of the deputy sheriff is not good, but I apprehend that the arrest was there made by the assistant in the absence of the deputy sheriff. 6 Mac 211

Sheriffs and Jailors

1 Inst 151
 114
 3d Mac 442
 107 M 1

If the sheriff directs a warrant to two persons, either of them alone may execute the writ. The warrant that the authority here is of a public nature.

I take it to be a general rule that where the authority is of a private nature, if it is conferred upon two or more persons, it is exercisable by them jointly, & not separately, but that if the authority is of a public nature and conferred upon two or more persons, either of them may exercise it separately, or they may exercise it jointly.

1 Nov 9
 4th Mac 442

If a deputy sheriff is guilty of any neglect of duty the sheriff may maintain his writ against him. The warrant is that the sheriff is himself liable and in the first place, and in the second, it is a violation of an implied contract on the part of the deputy. — Actions of this kind now seldom occur — it being the general practice for the sheriff to take a bond from his deputy for the faithful discharge of his duty — so that the remedy is now universally in an action upon the bond.

9 B 114
 4 D 36
 11 Nov 22

The jailor in every county is also a servant of the sheriff, appointed and removable by him. The sheriff being ex officio the keeper of the gaol. The sheriff has no right regularly to confine his prisoner in any other place

As the common law. As a general rule then if
he confines them in any other place, he is guilty Litch 10.
of false imprisonment for the two injuries. ^{1 Hbl 202.}
his person is committed to the common goal ^{5 Pac 176.} ^{Salk 463}

As we have in Dorset but one prison
in a County, it has been determined that as a
sheriff is the keeper of the goal in that count. ^{Keble 3}
ly, he cannot be committed to prison in a civil, non- ^{3 Lon 399}
civil case - he cannot be arrested. ^{1 Mod 198.}

I take the rule in Eng - to be that the sheriff
may be arrested and committed to any
prison, in the County of which he is not keeper. ^{6 Jon 211}

What then is to be done in a criminal
case - I take the rule here to be that the
sheriff may be taken to the prison of another
county at necessitate rei - but this cannot be
done in a civil case, for there otherwise, there is
no direct authority.

How far the sheriff is liable for the
acts and defaults of his deputy.

The deputy being but a servant of the
sheriff, the latter is in most cases liable for ^{1 Kent 514}
the acts and defaults of his deputy. ^{3 B 39.} Hence ^{1 Mod 194.} the sheriff is
allowed to take security from the
deputy for the faithful discharge of his duty. ^{1 Hbl 15.}

As to the extent of the sheriff's liability
for the deputy the rule is - the official acts
of the deputy are to all civil purposes the
acts of the sheriff and therefore when they are

Sheriffs and Deputies

injurious to another, the latter is civilly liable, but he is never liable criminally for the act of his deputy. The civil wrong is imputed to the sheriff, the personal remedy can be, for the rule is that no man can be considered criminal, unless his mind concurs in the act. — But this is not necessary to render him liable in a civil case. — His wife however does not inherit the sheriff for the private torts of the deputy, — they not being official acts — and therefore not committed by the command of the sheriff express or implied. — But if in executing a legal process the deputy acts unlawfully, the sheriff is liable, for here the deputy acts under color of his office.

Here arises the question whether — if the deputy carries an execution against C on the goods of B by mistake, the sheriff be liable to B? — Is the sheriff acting under a writ — under a legal process committed to him by the sheriff? — The act must be considered the act of the sheriff — this is not a wilful tort, but the act was done for the purpose of executing a legal process. This has been so decided & authorities that the sheriff is liable in a trespass in cases of this sort — and the reason given is that the sheriff and all his deputies are considered as one officer. This seems departing

220 R. 154
 Long 421
 220 R. 154
 Lat. 189
 1 West 268
 C. C. 320

Mol 94
 12 John 121
 12 John 121

220 R. 154
 220 R. 154
 220 R. 154
 Long 42

220 R. 154
 May 27
 220 R. 154

Sheriffs and Jailors

a deputy is, liable himself for neglect as much as for misfeasance — for here the deputy is a known public officer — and the want of this character is the cause of his non-liability at law, the existence of it here will consequently render him liable.

36 22
De B. 308
Mar 11,

After the death of the sheriff, and before a successor is appointed, the prisoners, ^{of the sheriff} escape, no one is liable, for upon the death the authority of the jailor ceases. The only remedy then is to appoint a successor to release the prisoners.

It is however, that the difficulty is more ^{of the sheriff} legal than real, it is true that upon the death the authority of the jailor ceases, yet the public would certainly indemnify him against an injury that he might sustain ⁱⁿ retaining the prisoners in confinement.

Tab 323
be 773.

Mar 557.
Vol 392 4.

If a sheriff has begun execution as by seizing property upon an execution, and is removed before the process is complete — he must complete it after removal. All things executory require the original act, and execution is one entire thing, and therefore considered as done from the time of its commencement. The same rule holds in count as to corporations, they being elected annually, though an officer expires at the end of a year. But acts begun by them before removal must be completed by their successor.

Authority - v. Duty. Sheriffs and Bailiffs of Sheriffs & their Deputies ⁸¹

In Eng the sheriff is a judicial as well as an executive and ministerial officer. In Court he has no judicial authority whatever. 1 Bl. 634 B.
4 Bac. 428. 9.

I shall treat of the sheriff only as a ministerial officer, and as a conservator of the peace, in which latter character he is strictly an executive officer.

A ministerial officer I take to be one who executes the law in obedience to the command of some superior officer.

An executive officer is one who executes the law without any such command of a superior officer, when he executes *ex officio*.

In the first place then I consider the sheriff as keeper & conservator of the peace - 1 Bl. 363
2 Bac 334 in that character he is the first executive officer of the county - and as a general rule has a right to command the assistance of all others.

The sheriff has by *Q. L.* a right to commit to prison all who break the peace or attempt to break it, and may bind them to observe the peace. He is bound *ex officio* to apprehend and commit all persons murderers &c to prison. And he is bound to defend the county against public enemies. 1 Inst 159.
2 Bac 420.
259.

And for the better purpose of executing all or any of these duties, he may command the posse comitatus of the county, which includes

Sheriffs and Jailors

Statute 384. cludes in Eng all persons above 15 years of age except peers, of the realm. In Lon the sheriff's powers are given by stat and he has the same general authorities as he has at C.L. In Lon the same powers to preserve the peace are given to the constables in their respective towns, as to the sheriffs in their counties. Of the Sheriff as a ministerial Officer.

1 M.C. 344.
 1 M.C. 344.
 4 M.C. 449.

As a ministerial officer he is bound to execute all legal process directed to him. And an refusal is subject to fine imprisonment, and a civil action in the case to the party aggrieved by the refusal - an C.Law.

The course of proceeding ^{now} against a sheriff for neglect to return a writ is different from that in Lon. In Eng the party interested in the return obtains a writ to ^{to execute the writ} against him, in a given time, and if he then neglect or refuse, an attachment issues against him for contempt of Ct. In Lon the practice in such case is to sue him for not returning the writ.

Statute 601.

Our stat also makes it the duty of the sheriff to give a written receipt of every writ given to him, if demanded, and if he refuse other persons may sign a certificate of the delivery and this will be good evidence against him.

Statute 601.
 1 M.C. 344.

A known officer as a sheriff is not bound to return his writ before he makes an

arrest or seizure of property even tho demanded. But ^{9.869}
after the arrest or seizure he must show ^{6.748} ^{2.8.187}
one demanding a person claiming to act as a pub-
lic officer, does it at his peril. ^{2.8.187}

But a special deputy or bailiff
must show his writ before the arrest or seizure,
if demanded and he will not be may be
lawfully resisted. The reason is that he is not
a known public officer.

Such a special officer however is ^{2.8.187}
not bound to show his writ unless it be de-
manded.

The sheriff in the capacity of minister of
justice also, and his deputies may demand
the assistance of the county.

The stat of Lon provides that in case of
great opposition made or expected to the execution
of a process, the sheriff with the advice of a
justice of the peace may raise the
militia of the county to his aid. And
the officers ^{men} are bound to obey him, and he
cannot return that he is unable to obey ex-
ecution. This is in reality conferring upon the
sheriff greater powers than he had at O.L. ^{St Lon title}
for at O.L. it is true that he could command
the assistance of all the individuals, but not
as individuals, whereas now he commands
them as an organized body of men.

Shreds and Tails

To ascertain how far a sheriff may be in-
fined in breaking an anti-slavery page or window of a man.
now have nine titles ^{affixing page} & respect on their real.

4 Mac 50
Luk. 200
4 Can 340

But the stat. of 29 Ch. 2^d and one of our an-
cient ^{statutes} ~~proves~~ ^{is} no ~~alter~~ ^{alter} can be made on Sunday, and if it
is so except it is void. consequently impri-
sonment on Sunday in a civil case subjects the
officer for false imprisonment. But if a
prisoner escapes he may be retaken on Sunday,
it being a mere continuance of the officer's
custody.

Jack 520
6 Mar 95
2 Bac 245
5 J. N. 25

57 ad 95
4 Dec 45

And in case of an illegal arrest on Sunday the Ct will discharge the prisoner on motion.

The subject of arrest is so intimately connected with that of escapes that I shall consider them both under this title.

Whenever a person being under lawful restraint ^{restained} of his liberty, either violently, or privily, evades that restraint before delivery by due course of law, he is said to have made an escape. The evasion of lawful custody is an escape. You will perceive from this definition that it is essential to an escape that there be a previous legal arrest. There being no wrong in evading an unlawful restraint, and the escape implies a wrong. The doctrine of escape then always implies a wrong in the escaper, being an evasion of lawful restraint.

Comp 55
Exp No 607-8-9

Every arrest to be in itself lawful must be made by lawful authority. And an arrest without lawful authority is void. But an arrest may be lawful sometimes be lawful without a writ or warrant.

Where an arrest is made in pursuance of a writ or warrant, the general rule of law is that if the Ct. from whom the writ issues has jurisdiction over the subject matter of the writ, the arrest is lawful. So that if after such an arrest the sheriff permits the prisoner to go at large, the sheriff is guilty of an escape. And this is true tho' the process be erroneous, the sheriff cannot go thereon permit the prisoner to go at large. If the process is void however he must let the prisoner go at large, for he ought not to have arrested him. If then a writ issues from the Ct of RC M, to the sheriff to make arrest on a plea of trespass, & if the sheriff makes the arrest tho' the process be erroneous still he may not let the prisoner go at large for that Ct has jurisdiction over trespass. But it would be otherwise were the writ issued upon a plea over which the Ct had no jurisdiction for here if the sheriff makes an arrest, he is not guilty of an escape by letting the prisoner go at large, for he had no right to arrest the man, and consequently

4 Bac 115

2 Will. 584

88141st

58621

24 509

Exp. 21 222

391. 639

Sheriffs and Bailers

now to retain ~~the~~ him.

Can't if the sheriff makes an arrest upon a process which is absolutely void, he is not liable under the facts stated, unless the writ shows upon the face of it that it is void.

If it appears upon the face of the process that it is void the sheriff is ~~not~~ liable, otherwise he is not.

In the above cases I have gone upon the supposition that there was no improper conduct in executing the process. For if the process is void the arrest is void. For if a writ is returnable at a more distant time of the Ct. than is necessary, the writ is void tho' the Ct. have jurisdiction over the subject matter of the writ.

The time for return in Ex. Ct. is fifteen days; suppose the writ then to be made returnable in the third or fourth or fifth term, the writ is void, for it ^{can never be} made returnable later than ^{after the time necessary for the execution of the process} the next ^{to} ~~the~~ ^{of the process} ~~the~~ ^{of the process} notwithstanding the Ct. has jurisdiction over the subject of the writ.

It is absolutely necessary for the security of the det. ~~that~~ ^{that} such a writ should be void. For if it were merely erroneous it could not be set aside until the Ct. sits again, he might if he could not procure bail be in prison until the time for the writ to

3 Writ 241
1 Root 215
Ex. Ct.
Ex. Ct. 148
Talk 215

Sheriffs and Jailors.

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be returned, so that a malicious p[ro]cess might have the d[e]f[t] confined for any length of time without any possibility of the d[e]f[t] delivery until the Ct arrived at which the writ does returnable, and then he could recover nothing for such imprisonment.

To apply the distinction above mentioned to the practice of bount some distinctions are to be made. On bount, no process does usually issue from the Ct to which it is returnable.

On bount if the process is issued by a proper authority and the writ returnable to a Ct having jurisdiction of the subject matter of it an arrest under it is lawful.

On the other hand if process is issued without competent authority, and is not returnable to a Ct having jurisdiction over the subject matter, the process is void, and an arrest would consequently be void.

This amounts in some principle to the same thing as the rule of the English Law.

At Ct a sheriff having made an arrest on judicial process cannot delegate to a steward or other officer the keeping of the prisoner in his absence. At Ct.

So that if he have him in custody of a man he is guilty of an escape. So if he enlarge him for any time.

Sheriff's and Jailers

I believe however that the practice is then
often different from this rule.

I observed that to make an arrest
Ex Lib 004 legal, that it must be made by proper authority.
2 Mac 233 I further observe that the arrest, must be
actually made before there can be any escape.
Without both these circumstances there
can be no escape.

In the first place there can be no
escape without a lawful arrest — What
then constitutes an arrest? bare words never
can constitute an arrest — but there must be
2 Mac 233 an actual touching of the body of the party
to be arrested, or power of immediate possession
of the party, & submission to that power on the
part of the person ^{to be} arrested.

That actual touching is not essential
if the party immediately submits to the arrest
upon being told that he is arrested ^{in this case} there being in
what is tantamount to actual possession.

If a man is arrested at the suit of B & A
a writ in favour of B is
delivered to the Officer, the debt is considered
in law as in custody of at the suit of B & A.

6
2 Mac 239
2 Mac 237
Of course if, after the writ in favour of B
is delivered, the Sheriff permits the prisoner to
go at large he is guilty of an escape to B as
well as to A.

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But I doubt whether the rule thus generally laid down will hold as to arrests in Canada. There being a difference even in the practice here ~~to~~ that in Eng. Our process goes not only against the person but against property and person both.

The arrest must not be actual only, but must also be regularly made - otherwise generally speaking there can be no escape; ^{such} the arrest being generally unlawful.

In all civil cases an arrest must be made with a writ or warrant - otherwise it is unlawful. Ex Ld 204
Ex Ld 21
2 Mac 251

And the arrest must be made by an Officer of that office to whom the writ or warrant is directed. This does not require that the arrest be made by the hand of the officer, but may be by his assistant. All that is meant is, that he must be in company of the person, making the arrest under his authority.

Again - the rule requiring that the sheriff must be in company of the follower ^{Ex Ld 204} at the time of the arrest made by the latter ^{2 Mac 211} does not require that he should be in sight of the follower, but he must be in pursuit of the same object. Ex Ld 204

An arrest on the Sabbath being void ^{Sabb 77} the officer by permitting the prisoner to go at large, is not guilty of an escape. Ex Ld 204
2 Mac 251

Sheriff and Jailors

If the officer has an opportunity to arrest
 9 Mar 20-2 the deft, and refuses to arrest him, the latter is
 De Ma 321 entirely exonerated the arrest - the officer is liable
 10 Mar 297 to the plaintiff in an action on the case but is not
 289 guilty of an escape. So if an officer makes an
 181 De 304 arrest by breaking the door or window of a
 607 mansion house, he is not guilty of an escape
 1819 by permitting the prisoner to go at large -

Of the right of the sheriff to break
 an outer door or window.

A sheriff or other officer may not
 3 E 91 break the outer door or window of a dwelling
 in Gliz 003 house to arrest the owner, or take his goods.
 1818 621 A reason assigned is that his house is his
 181 De 604 castle. A reason assigned in the old books is
 1819 1. that the family should be exposed to great
 1819 283 danger from exposure to robbers from the
 doors being opened by the sheriff.

The first reason is of general origin,
 and the doctrine appears to be highly absurd.

It is said however in some of the old
 1819 1819 books that the execution of the process is good
 1819 1819 tho' the officer is liable as a trespasser. There
 1819 1819 always appeared to me an strange incongruity
 1819 1819 in this principle - it makes at one end the
 1819 1819 owner liable for the arrest his lawful and the
 1819 1819 person making it at the same time liable
 1819 1819 to the party arrested, and to an indictment

1819 1819 were open
 1819 1819 by the
 1819 1819 deft.

for breach of the peace. It would seem much more consistent with principle that the arrest should be unlawful - and later authorities seem to establish this opinion.

5 B & A 4
2 B & A 320
2 B & A 380
2 B & A 540
Bridg 4
Coff by 605

The rules on this subject do not describe what constitutes a breaking - I do not suppose it necessary that the glass and windows should be forced in order to make an entry a breaking, but I imagine that lifting a latch or opening a door without permission to be a breaking. But in modern times the principle of castle has been construed strictly and extends only to the outer door or window of the house. The officer may break open any inner door partition, chest closed &c - but he may not do this wantonly, but must first demand that it be opened.

4 B & A 102
2 B & A 380
2 B & A 540
2 B & A 540
2 B & A 540

Again the privilege of the outer door and windows extends only to the owner and family dwelling in it, and not to a stranger. If it is in the house of B, and the sheriff with a writ against A requests it to give him up and he refuse, the sheriff may break the door so also if the goods of A were there.

5 B & A 380
2 B & A 380

In the case of criminal process this privilege is not allowed at all - the sheriff might first to make known his business and demand admittance - and then he may enter by violence, if refused.

5 B & A

vide the case of
the N. Garrell in
its subject of a
private room in
the same.

Sheriffs and Jailers

In process there is no field one to find another
for the peace or good behaviour their privilege does
not hold, for this is of the nature of criminal
process. So also where one is known to have
committed a felony is pursued without warrant.

2 Hawk 139 a - whether by a private person or an officer
the privilege does not hold.

But where the house of a person
is broken on suspicion that the owner has
committed a felony the sheriff is answerable for
it. But if the person was known to have committed
the felony no blame attaches to the sheriff.

If an affray takes place in a dwelling
house, the house may be broken open to quell
it. So a house may be broken to prevent a
breach of the peace likely to take place in it.
So if persons are pursued for an affray
their houses are no protection.

So if an officer has a writ of habere
facias possessionem to take the house, he must
ex necessitate rei be permitted to break the
doors for the purpose of taking possession.

So in civil process the door of a barn not
joining the house may be broken, and the
same rule I trust applies to all out houses
or stables not adjoining the house.

A case occurred in which the sheriff
having entered the house lawfully

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was locked in to keep out the sheriff the latter was held blameless in breaking the door to release him. Volu 32
§ 358.

If a person arrested as a civil process escapes into his house the sheriff has a right to break into the house to retake him - otherwise a continuance of his custody. Volu 34
§ 360
14th Ch. 25.
1844 R 135

But if a person illegally arrested by the breaking of an outer door, while in custody is charged with another process in favor of another person, the latter arrest is good provided there be no collusion between the officers or parties. 2 Vol 12 823
§ 359.

Prisoners are distinguished by the law as of two kinds voluntary and involuntary.

Every person committed to prison is to be kept in safe and close custody if when the jailer permits the prisoner to leave the prison limits even for a moment he is guilty of an escape. 384.
Kane 36.
2 Bac 237.

A voluntary escape is one that takes place with the consent of the jailer or officer having the prisoner. 384 215.

An negligent escape is one without such consent.

Voluntary Escapes.

If a sheriff or jailer admit to bail a prisoner who is not by law bailable he is guilty of a voluntary escape. And if he permits the prisoner to go out of the limits of the prison for a moment's notice the case is the same he is guilty of a voluntary escape for the law

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prisoner, that he or she is sane and sane enough.

The rule is the same as to a person arrested on execution, that he has not been committed to prison.

Prisoners committed on criminal process are by our laws & probably in every one required to be confined within the walls of the prison.

Those confined on civil process by giving securities to save the sheriff harmless, may have the liberty of the prison yard.

The rule as to letting the prisoner out of the limits is so strict, that in warthorn decided in *Ex p. Part* that a sheriff who brought up a prisoner on a writ of habeas corpus was held guilty of a voluntary escape. This is now shown and has since been denied to be law.

If an officer bringing up a prisoner on a writ of habeas corpus grants him any unnecessary or unreasonable liberty, he is guilty of a voluntary escape. He must bring the prisoner to Court in a convenient time and in the most convenient way. This is a settled rule.

And an officer having made an arrest on civil process must commit his prisoner with all convenient time and if he does not he is guilty of a voluntary escape. So if he permits the prisoner to stand about with a keeper.

2 D. R. 20.
1 Mo. & W. 26.

1 Lev. 13.
1 Phil. 13.
1 D. R. 134
1 Mo. & W. 72

3 Keble 305
Ex p. 14.
2 D. R. 24.
399. 733.
6 Mo. 78.

1 Mo. & W. 24.
2 D. R. 178

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And as no man can confine his words of flattery
a sheriff marries a woman committed an exe-
cution he is ipso facto guilty of a voluntary
escape.

Of a prisoner having the liberty of the
yard shows a disposition to escape as by
transgressing the limits, it becomes the duty
of the sheriff to confine him to the walls, upon
the fact's coming to his knowledge and if
he does not and the prisoner afterwards escape
he is guilty of a voluntary escape. But if
he exhibits any such disposition, the prisoner
held exhibiting any such disposition, escape
the sheriff is guilty only of a negligent escape.

I said with regard to the liberty of the
press we must observe that Sheriff is not bound
to grant it in any case - he may carefully
watch - but it is always discretionary with him.
And after he has granted their liberty he may
retract it at pleasure.

Of Negligent Escapes.

A negligent creature is one that hap-
pens without the consent of the officer who has
the custody of the prisoner. Thus if one evades
his custody without his knowledge.

So if one escapes by breaking the prison, or by a rescue, the ~~sheriff~~ ^{sheriff} ~~may~~ ^{may} ~~not~~ ^{not} ~~be~~ ^{be} ~~considered~~ ^{considered} ~~responsible~~ ^{responsible} for the escape is negligent.

By the difference between an escape
on merne and one on final process.

There is in some respects a very material
difference between an escape on merne process and
one on final process - and also in the consequences.

That which will constitute an escape
on final process will not always be one in a
merne process. The liability of the officer for
an escape on final process is often different
from his liability in a merne process.

If a person arrested on final process
is permitted to go at large even for a moment
the officer is guilty of an escape.
2 Bl. 132.
3 Bl. 415
2 Wils. 295
2 Root 132.

But a person arrested on merne process
and not committed may be permitted to go at
large if he without wilfully neglecting the officer,
if he be forthcoming at the return of the
writ. And in such the officer will not be
subjected if he be in the evening during the
life of the execution.

2 Bl. 104
2 Bl. 415
2 Wils. 295
2 Salt. 408
5 T. R. 37.
2 East little
dict. crim.
{ 2 East 209.
252 4. 24.
2 Smith 174.

That if the prisoner arrested on
merne process and permitted to go at large, be
not forthcoming at the time, the officer then
becomes liable for a negligent escape.

2 Mac 240
2 Roll 99.
204.
{ 2 East 122.
252. 558.
2 Wils. 294.

So that whether the permitting the pris-
oner to go at large be an escape depends upon
a contingency.

Take this distinction, that a person
arrested on committed on final process, if
he is permitted to go at large even for a moment
he escapes, subjects the officer to liability for

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of his claim against the sheriff.

There is also a difference in the consequences of an escape on mesne and one on final process.

If one arrested on mesne process escapes the plaintiff's remedy against the sheriff is by an action on the case. The damages are merely presumptive; and the plaintiff cannot recover of the sheriff, unless he show a legal claim against the ^{mesne} escaped.

In this case the prisoner's acknowledgment of his indebtedness to the plaintiff is good evidence against the sheriff, in the suit of the plaintiff against him for the escape. For as such acknowledgment would have entitled the plaintiff to recover from the prisoner, it is but fair that it should be valid against the sheriff, ^{there} whose fault the plaintiff has lost the power to obtain justice from the prisoner.

For escape on final process, the plaintiff may have an action on the case against the sheriff at C. L., or by the statute ^{2d & 3d} ^{West} 2. & 3. c. 2, an action of debt, at his election.

If the plaintiff brings an action on the case against the sheriff—the jury may give either the whole demand against the escapee or a leg sum.

2 Bac 249
2 Wils 299
2 D. R. 129
4 D. R. 111
H. 348.
C. L. 18.

1 Esp. R. 109
Heathcote v. B. 5

2 D. R. 110, 113.
2 D. R. 129, 132.

2 D. R. 104, 8.
H. 108.

Part 2

If however the jury give against the sheriff as damages the whole demand against the escaper, the plaintiff cannot recover against the prisoner. But if they do not give the whole demand the plaintiff may recover of the sheriff debtor.

2 Bl. 297
2 T. R. 129
Exp. de 509

But if the plaintiff brings debt against the sheriff, the jury are bound by law to give the plaintiff the whole sum charged in the writ.

2 T. R. 129.
2 Bl. R. 104. 8.
Exp. de 509.

But stat in Con seems to require that in case of a voluntary escape whether from an arrest on mesne or final process, a substantiated Com. of action may be, the plaintiff may recover of the officer the whole amount. And I apprehend that the stat gives the same rule as to all voluntary escapes from prison, as abettors in any such an action for debt as an escape on final process.

2 Bl. R. 358

If a person arrested on mesne process & before commitment to prison is rescued the officer is not liable for the escape. But if one arrested on final process is rescued the officer is liable for he ought to have sufficient force to protect him if it is said. I do not see the reason of the distinction for why should he not have a sufficient force to protect the prisoner in one case as well as the other. Nor has he more time to raise the posse comitatus in one case than in the other.

3 Bl. 418
2 Bl. 539
Exp. de 610

Sheriffs and Jailors.

1844
Chol 803
Dec 432

But after a debt is arrested as *in rem* process and committed to prison, rescue does not excuse the sheriff, unless made by public enemies. It is one then by a mob traitors &c is no excuse, for the law will not admit the presumption that any power is superior to that of the sheriff, in his own county, except that of public enemies.

There is good reason why the sheriff should be liable for a rescue from prison — for he ought to have a person sufficiently strong and stout, it's situation generally a distance can easily be obtained, and he often always place a second round it if he please.

On those cases in which the sheriff is liable for a rescue, the plea in the process is one the sheriff or the rescuers at his election. But if he sues the rescuers, it seems an inference that he waives his claim against the sheriff. Now I suppose ^{the reason} that he thus waives his remedy against the sheriff if he sues the rescuers is, that by bringing his action against the rescuers, he induces the sheriff to waive his remedy against the rescuers, so that if the law should afterwards come upon him he might be defeated at his own suit against the rescuers.

It is said in some of the books that the plea, remedy against the rescuers may be by an action of trespass or trespass on the case.

This I suppose to be considered law, but I do

500 ad 217.
de Ch 77. n
difficult 404.
Hutton 98.
Ext. L. C. C.
885. 166.

Camp 150
C. 7435

not think it founded in principle for the same reason is no more so the plaintiff suffers only a consequential damage - and his proper remedy should be action on the case

If the plaintiff brings an action against the rescuers the jury may give what seems proper they please - either the whole or part of the original demand. It may however be presumed that a jury will not give less than the whole.

If the jury give less than the whole demand, the plaintiff may sue the party rescued - but not if the jury give against the rescuers the whole demand.

If an action be brought against the sheriff for an escape on mere process - his return of rescue is conclusive and defeats the action and his return cannot be contradicted. *Supra* 4 Mac 404
More than the sheriff to return a rescue when in fact there was none - the plaintiff's remedy is to sue him for that false return. Now the reason why the plaintiff must resort to an action for a false return instead of contradicting it is that the law will not permit such an official act to be contradicted unless by pleading putting it directly in issue. What I do not know whether this will still hold in Court, for in some cases, it is here permitted to falsify the return of ^{an officer} ~~process~~ by a plea in abatement.

6 Mac 211.
Ex p. 5349.

2 B & A 980
Comber. 295
1 Vent 242
2 D° 170
4 Mac 404

Sheriff and jailers.

Dr. 44 n. 109
H. 44 n. 98
H. 44 n. 180

Where a prisoner is taken from the sheriff the latter may have his ^{action} ~~comes~~ against the prisoner, but I suppose that the rule applies only where he is liable over to the plaintiff in the process. He has no interest in retaining the prisoner otherwise than that it is his duty.

Pl. 482

And it is an established rule that if a sheriff brings up a prisoner on a habeas corpus, rescue is no excuse.

4 B. 84.
3 B. 784.
2 H. 44 n. 113.
Dyer 558
1 Mol. 508.

After a person arrested even on mere process is committed, nothing but the act of God or public enemies will excuse the sheriff in case of an escape.

And hence it is a rule, that fire occasioned by any thing else than lightning, is no excuse.

Now cases of this kind might occasion very great hardship to the sheriff and he might sometimes according to principles of abstract justice be perfectly innocent - but the policy of the law could not require less.

And the legislature can interpose in extreme cases, as they did in the case of the great fire at London or the mob raised by Sir George Gordon.

Difference of the consequences of a
Voluntary and negligent escape.

202.

It was formerly holden that in case of a voluntary escape an final process, that the liability of the escaper was transferred to the sheriff, so that the plff's remedy was against the sheriff only. This rule was established in order to operate heavily upon the sheriff. But it is now settled that this is not law, and it is settled that the plff may have a new action of debt against the party escaping, or upon a writ facias a new execution. And now by the statute a new execution may issue without a writ facias, and it seems that the plff may now retake the prisoner upon the old execution.

2 Mac 239.
Hill 62. 202.
3 Pl 215.
2 Mac 241
1 St. 530.
1 Dent 4. 269.

And if when a person is committed on a writ process, the sheriff permits a voluntary escape the plff may retake the deft by an escape warrant.

2 B. & C. 252.
2 Will. 295.
Exp. Di 611.

But the officer suffering the voluntary escape cannot retake the prisoner, nor maintain any action against him - being a party to the escape. — And if the officer in such a case does retake the prisoner he is guilty of false imprisonment. For the sheriff has then forfeited his right to detain him - and has no claim upon him. — And for the same reason a bond given to the sheriff, to save him harmless against a voluntary escape is void as being against law, being a bond to save him harmless for committing a crime, which

2 B. & C.
3 Pl 415.
2 B. & C. 150.
1 St. 530
1 Vent 209.
2 B. & C. 175.

1 Bon. & C. 190.
2 Paul. 1213.
10 B. 180 B.

Sheriffs and Jailers

is against O.L. ex dolo male non actus actio

But the p[er]son who he has sued and recovered against the sheriff, may still take and sue the prisoner, provided he recovered off the sheriff less than his whole demand. For if he recovered less of the sheriff, it will be considered in the light of special damages, and his demand against the prisoner will remain the same.

But if the escape be negligent the sheriff may sue the prisoner, or he may immediately bring his action against him for an escape. But if the sheriff has taken a bond of indemnity, he must resort to an action on that.

But the sheriff's bailiff, cannot at O.L. have an action against the escapee, even tho' the sheriff may have an action against him, because he is not liable, it is said at law not being a known public officer, but is liable to the sheriff only as his private contract with him. This reason seems a very artificial one.

And a party escaping may be taken by an escape warrant in a State different from that in which the escape took place.

A question is whether a special bail may release his principal in another State - I think he has a right. And the Chief Clerk Virginia.

Re Ellis 204.
38. 52.
1 Mac 45-6.
1 Root 151.

Re King 349.
Exp. De. 613.

Root 109
3 Exp. De. 613

3 Exp. De. 172
McGould's opinion
1. 209 435
3 Exp. De. 125

decided that he had no right. But here it was decided that he had, and a similar decision also took place in New York.

My opinion is that an escape warrant gives no authority ^{whereas} in any other State; the right to take ^{the} prisoner ~~into~~ without the escape warrant.

If a person arrests an criminal ^{proceeds} 2 March 1823
25 escape he is punishable for the escape to fine & 2 Dec 1820
130 imprisonment. But if he escapes to breach of prison, he is ipso facto guilty of felony. I conclude that there will all not bring him down, because there have been many escapes of this kind in Court but there ~~has~~ ^{have} never been carried to execution.

Officers who after an arrest of a felon suffer a ~~negligent~~ negligent escape is punishable by fine.

An officer voluntarily permitting the escape of a felon is guilty of felony, but he cannot be 17 Hal 66 punished for felony until the prisoner has 2 March 1823
130 been convicted of it. But he may be prosecuted for a misdemeanor and subjected to fine & imprisonment. As the prisoner should not have been retaken & arrested.

Sheriffs and Jailors

Strong's Mi-
nisters 547.

Ex. Di. 512
Whe. R. 146

If in the case of a negligent escape the sheriff has been obliged to pay the debt, he may be doubtless maintain against the escape an indebitatus assumpsit for money laid out and expended for his use. As to this rule there is no doubt nor contra-
dictory opinion. The sheriff is guilty of no fault.

The same point has been twice decided at Nisi Prius, where the escape was voluntary on the part of the prisoner or keeper, but the last decision was addressed to this rule. So that it may now be considered doubtful how it will be decided. I have always been myself in favor of the former decision. If the sheriff himself had permitted the escape he could not recover being partyiceps criminis; but when the jailor permits it without his knowledge he certainly is not partyiceps criminis. It seems to me that the only objection is that the sheriff was guilty of offence, but here the sheriff is not guilty of an offence, and he cannot be indicted for it, he is guilty of no crime.

After a negligent escape, the sheriff relieves the prisoner by fresh suit, before any action brought against himself, his liability to the plaintiff ceases. And it is now settled that an action brought before the action is brought against the sheriff, it is a relaying or a fresh suit. But why it may arise does such relaying bar.

St. 908.
2 Mac. 247.
3 C. 44. 52.
1 West 211. 217.
2 D. 120.
1 Root. 100

Sheriffs and jailers.

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the plff's action against the sheriff, the reason I take to be that the prisoner being now in safe custody the plff has suffered no damage. But why should it not defeat the action after it is commenced? The plff has at the time of the vent. a right to commence it, and no act of the other party can defeat it. Tho' at the same time the return of the prisoner will make the damages merely nominal.

He 394
P. Blin 637
G. 263
3844

And a voluntary return of a person into custody, before action brought against the sheriff, will have the same effect as a recapture of fresh suit.

But in case of a voluntary escape, retaking is no excuse for the sheriff for he has no right to retake the prisoner. And as a recaptor in such a case will not save the sheriff so neither will a voluntary return of the prisoner.

If the sheriff permits the prisoner to go at large with the consent of the plff, the plff cannot have an action against the sheriff for he has suffered no wrong. But after a voluntary escape has been permitted by the sheriff, the desert of the plff will not deprive the plff of his right of action against the sheriff.

After a negligent escape the sheriff may retake the prisoner for his own security even after an action brought against himself.

2 Will. 294
Exp. 514
3692
Salt 291
Exp. 672

Sheriffs and Jailers.

in Chi 204.
1 Mas 194.
{ 88 D^o 225.
386.
2 Mac 248.

A sheriff has no right to discharge the prisoner committed on execution, upon payment himself of the contents of the execution, and if he does, he is guilty of a voluntary escape, for after the return of the execution he ceases to act as attorney to the jail and is merely a keeper of the prisoner.

the 908
Eng 21 611

I have observed that upon a negligent escape the sheriff may retake ~~the~~ the prisoner for his own security. But if after a negligent escape the plea in the process discharges the escaper from his demand against him, yet the sheriff cannot retake the prisoner for the payment of his prison fees. For by his own fault he has lost his lien on the prisoner, tho' he could have retaken him for that purpose.

Reed 108-3

If a prisoner having the liberty of the jail escapes the sheriff or jailer has as much right to retake him as if he had escaped from the walls.

1 Root 124.

Of course a recaption on fresh suit, or voluntary return saves the sheriff. But notwithstanding this the sheriff is not himself liable, he may still recover on the bond of indemnity given him. Tho' he can have no action on the case. For the condition of the bond is broken. It is true that the sheriff having suffered no real damage, can recover only nominal damages.

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But after such an escape, neither the ~~the~~ prisoner, *West 128*, nor his bondsman can compell the sheriff to receive him again.

But after the sheriff's liability to the plaintiff has ceased, the bondsman is not liable for the debt - tho he is liable for special damages;

Now the liability of the sheriff ^{continues} under our stat. I believe to be two years.

But tho the sheriff cannot recover the debt of the bondsman, he may recover special damages on the bond.

Suppose then that before the plaintiff's remedy against the sheriff is barred, *West 151* that the latter has recovered of the bondsman the whole debt, and that in the mean time the plaintiff's claim is barred by the stat. our Ct decided that the bondsman should be relieved as an *audita querela*.

The rule as to declaring in an action for an escape is somewhat anomalous.

There are two kinds of escapes voluntary & negligent; different in their natures & consequences, - yet it is not necessary to state in the declaration whether the escape be voluntary or negligent. The consequence is that under a count for a voluntary escape, the plaintiff may give in evidence a negligent escape & that would support the count. But how can this be? Ed Hall gives an answer when he says, that in

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1 Vent 211. 215.

2 Mac 248.

2 D. H. 126.

it is impertinent to denominate the escape ^{as to the matter} in the declaration.

It is like leaping the rails before you come to the state.

But the count is, ^{on} a voluntary escape the plea of recaption on a fresh writ, is a good answer. Now then is the plea to avail himself of the distinction between a voluntary & negligent

1 Vent 217.

2 B. & C. 248.

escape. He does not suffer from the rule that recaption on fresh writ is a good answer, for if the escape is in point of fact voluntary, he states it so to be in his application, that is so by way of novel argument. This is now the universal mode of pleading.

Esp. De 612

I have observed that for a voluntary escape the sheriff and jailor are both liable, but for a negligent escape the sheriff only. If the plea then lies the under officer it seems that the sheriff is discharged. This is reasonable the Exp. etc. no authority.

It is after an action brought against the sheriff for an escape an final process, and before he pleads, the original writ is reversed, the sheriff is discharged, for he may now plead not bail record. For the original writ being reversed it is not an record, so that the plea cannot support his action, not being able to show the matter of record on which his action is founded. But if after judgment & execution

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hon against the sheriff the original judgment is reversed, the judgment is reversed against the sheriff stands good. Is the sheriff then remediable? No, his relief will be against the the execution against himself as an audita querela.

8 C 142
2 Mac 248
3 B & P 209
3 Mac 325
5 C 142

False Returns. in.

If the sheriff makes a false return, he is liable to an action on the case for it, to the party aggrieved or damaged by it. And the debt will become to the amount of the damage sustained. Can Count the debt may falsify the writ in abatement, No other cannot be done at all C.L. If then in law the debt should falsify the return the plaintiff being the suffering party could have the action. And both by the C.L. and now C. 13. 749 even the if the sheriff should make a false return of non est inventus, that being an injury to the plaintiff he will have a right to that action against the sheriff.

Exp D 515
1 Wils 356

Hi 500
Exp D 510
C. 13. 749

We have in Count's return rules introduced by Stat respecting escapes from prison different from those of the C.L.

In Engd. it is the duty of the sheriff to build & repair the common gaol in his county. In Count however that is the duty of the county. It follows then that in Count is the prisoner escapes this the insufficiency of the gaol the

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Feb. 22
 1850

Feb. 22
 1850

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 1850

courts are not the sheriff's liability as in Eng.

The remedy against the county, is by petition to the Ct of the county, and an appeal is allowed in favor of the petitioner to the superior court. In general however the liability of the county, has become only nominal. For as Ct have holden that if the escapee then the insufficiency, remains still liable, the plaintiff must pursue his remedy against him. And if he was not liable, the plaintiff sustained no damage by the escape. The county then is generally liable only for special damages.

If however the creditor can show actual damage to any given amount, that amount will always be given against the county, tho' this from what has been said above is seldom done. If however the creditor is unable to pay, and by means of the escape escapes the whole demand, it can undoubtedly be recovered against the county.

If however the prison escape be thro' the insufficiency of the jail, but facilitated by the neglect or fault of the sheriff or jailer the latter as well as the county is liable.

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This stat I consider as declaratory of the
 O.L. with for the reasons above mentioned - and
 from the wording of the stat.

As bound by a prisoner to the sheriff,
 condition that the obligor shall remain a co-
 surety. I have said is void. And a bond
 that he will thus abide ~~a~~ time previous
 until the execution is satisfied is also good.

But a bond that the obligor shall re-
 main a time prisoner until the debt, prison-
 fees, and board is paid is wholly void, for that
 part says the whole bond shall be void.
 Now the doctrine that when a con-
 tract is declared void in part, the stat. that it
 shall be ^{wholly} void deserves consideration.

Why should the bond be void ^{wholly} rather
 in the above case, than as to the prison fees and
 board, the first part being lawful. It being
 legal at O.L. to void one part of a bond, and
 permit the rest to remain valid. The differ-
 ence is founded I apprehend in this reason, the
 stat. declares the obligation, the security in
 which such illegal condition is contained to
 be ~~void~~, utterly void. So that the whole secu-
 rity is void, and not void only as to the
 illegal contents.

One Sub. Ct. seem however to have
 thought that the bond in such case, would be
 void only, guard the bond

for the stat. under
 2 Bac 554
 Kirby 183

St 2385
 Brown 8133
 2 B. & C. 551 -
 4 Bac 554
 10 L. 100
 1 Vent 254
 12 How 482
 12 Mees 688
 1 B. & W. 195

1 Root 55

Sheriff's and Jailors

All prisoners are by law required to support themselves except felons attainted. The latter having forfeited all their property to the king, are to be supported by the public. —

By the 1st law of Count a person committed to prison on any offence, is to bear his own charges and the expenses of commitment, if he has estate sufficient and his estate, will be liable to them.

In the first place however, these expenses are to be paid out of the state or town treasury, tho the prisoner is ultimately liable.

If a jailor receives a quarter fees then he is allowed by law, he is liable for all the damages, and to a fine of the 1st

Under our stat. law there is a proceeding which has now become very common, of committing a person committed on a civil process to what is termed the poor debtor's oath, which frees him from bearing his own expenses. The amount of the oath is that he has not an estate at the value of 17 dollars, nor a sufficient amount to discharge his debt, nor fraudulently disposed of his estate.

On admission to this oath he is discharged from the prison, unless, the plf. provide for his weekly maintenance.

There are a few miscellaneous rules which I shall now consider.

If a creditor voluntarily discharges a person arrested on execution whether committed or not, he can never afterwards relapse him, nor in any case enforce the judgment against him. The grounds of the rule are three: 1. That the keeping of the body of the prisoner being deemed a satisfaction for the debt, by releasing him, he is considered as discharging the debt. 18th 2482.
1st 2483.
2d 2484.
3d 2485.

And tho' the discharge of the prisoner should be in consideration of a new promise by him to pay the debt, & the promise be broken, the rule is nevertheless the same.

If however the discharge were in consideration of the new promise, the plaintiff may maintain a new writ upon it. 1st 2486.
2d 2487.

The judgment is completely satisfied by the discharge of the debtor, even tho' the promise be defeated by some defect. 1st 2488.
2d 2489.

And if a bond is given to the plaintiff in execution conditioned for satisfaction in execution, by the debt, it is void. 1st 2490.
2d 2491.

If then on such a discharge the debtor give the plaintiff a bond to render himself again on the execution the bond is void. For it is neither more nor less than a bond given to effect a false imprisonment, the having lost his body on the previous.

Sheriffs and Jailors

It has been once determined is soon better
 remove it that such a bond would be good -
 but it is a departure from the Eng. Law. I do
 not think that this rule will last.

Salk 574.
 20 Ba. 69.
 Co. Bl. 20.
 1 Enbl. 93.

If two joint debtors be taken in ex-
 ecute a release of one of them by the sheriff
 a release of the whole debt. I speak here of
 a release from custody.

2 Co. Bl. R

I suppose however it would make no
 difference whether the original contract on
 which they are sued was joint surety or joint
 a several debt as one remedy was recovered in
 against both they become joint debtors.

Hobf 52
 Co. Bl. 500.
 { Co. 130
 1 128.
 2 Mac 554.

It was formerly decided in Engd that if
 a sole debt insurance or executer died in prison,
 that the debt was extinguished. The general ground
 of the rule is "that the p^lff^y having elected his
 highest remedy ought to be bound by it." That
 is true and he cannot ^{voluntarily} abandon it, & take another;
 but he should one who has taken the highest
 but in no fault of his own, lose his whole
 remedy. But this was formerly law.

5 B. 80
 Co. Bl. 550.
 Co. 12143.9.

But if one of two joint debtors, dies, the
 debt as to the other was held not to be discha-
 ged. But now by stat 21 Geo 2 the joint
 or one of two rules is abrogated - that stat
 provides that if the debt die in prison that
 the p^lff^y may take out a new executer against
 the estate of the deceased debtor.

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help that ^{quest} continued from page 214

And tho' the prisoner be thus discharged, if about 58 he have or afterwards acquire an estate that will be liable to the debt.

Before he is admitted to the oath ^{st. Co. 265} of four days, must be given to the creditor to show any objections to it.

If the application of the prisoner is unsuccessful, he cannot make another ^{st. Co. 265} except to the chief justice of the Ch of B. H. or two justices one of whom must be of the

12 And if he is admitted to the oath, the plaintiff may apply to the chief justice or the two justices to discontinue the proceedings.

But the expense of his support, when paid by the creditor is to be reimbursed, ^{st. Co. 265} paid by the prisoner, & he if the cred^r will continue thus to support the prisoner, the latter can never come out until he has discharged both the debt and the expenses.

It is a rule of the O. L. of Am. that that debtors & felons are not to be confined together in the same room. And if they are under our stat the debtor may recover treble damages.

Under our stat if any county be des^t of a jail, a person required to be committed to prison, may be confined in the jail of any other county.

Our Court the county let have authority to order int. close confinement all

Sheriffs and Jailors

§ 567. prisoners committed for debt cost money, as
 except where the commitment is from the super-
 visor of Ct, and then they have the same authority,
 and if the sheriff refuses to do it, he is liable
 for a voluntary escape. — This authority
 does not extend to cases where the judgment
 does not exceed seventeen dollars.

Husband's power over the wife's personal property.

On the subject of barrow's case, no perfect treatise seems to have been written.

I shall now consider the right which the husband acquires in the personal property of the wife.

This property may be either in possession or in the hands of a third person.

As to all personal property of which the wife is the owner, the husband acquires an absolute title in the same manner as if it had been conveyed to him by deed.

On his death his property goes to his executor, & never reverts to her.

From this principle, it is apparent

that creditors of the wife may sue the husband. The husband is only liable for the debts of the wife during cohabitation. After his death his liability is determined. And if the husband dies, tho' his liability continues her personal property is no longer at his disposal.

This is the only case in which property is transferred by act of law, from one person to another, in the exercise of cohabitation.

The liability of the husband does not arise at all from the circumstance of his receiving any property from his wife, or from his being considered as the owner. The wife is considered as the owner, and after his death, the obligation survives against her.

The husband is joined with the wife for two reasons. He is deprived by the marriage of his

Baron and Esme

Husband's right to the wife's choses in action, personal property, and would therefore be liable to imprisonment, if the action could be sustained against her. The law will not trust to the caprice of the husband, and will therefore never suffer her to be imprisoned on that point. The marital rights of the husband, indeed, are paramount to the rights of any other person whatever.

Right of the husband to the wife's choses in action.

By choses in action, I intend her bonds, notes, &c., and with these is appurtenant her right to damages for an injury.

The husband's right over these is not so complete, as over her personal property in possession.

On the P.L. the husband may reduce the wife's choses in action to possession, and make them absolutely his. But if he dies without doing this, they still belong to her; and if she dies before her choses in action are reduced to possession, they go to her next of kin as a circumscribed.

When a contract is made with a woman before marriage by which she is entitled to a sum of money on the death of her husband, this is a chose in action, over which he has no control.

If the husband's attorney receives the money on the wife's chose in action, it is a receipt to her in her own contribution.

The husband may assign the wife's choses in action, as above, to a third person. But his power

1 Rol. 343.

2 Rol. 407.

3 Id. 156.

Br. 232.

1 Halk. 327.

Baron, 15.

Idem.

So, if the husband assigns to her under an agreement in the settlement, and she dies before her husband, this is a chose in action.

2 Vesey, 378.

Wife's choses in action.

In this respect is a limited one. She must make the assignment for a valuable consideration, or it will not bind her.

2 MS 209.
417.
1 MS. C. 24.

Although by marriage the personal property of the wife is at the husband's disposal, yet before the marriage, he agrees to settle lands, at a future time upon the wife; and that until that is done, the portion of the wife shall rest in some other person; — and he dies without making the settlement or leaving property, in which Ist can decree a specific performance, it has been decided that the husband's executor shall be trustee of this ^{if husband's property} personal property for the wife, until a settlement is made upon her according to agreement.

1 MS. 276.

The husband can never devise away the choses in action of the wife; but on his death if not a trustee the choses belong to her or her executors.

When the husband becomes a bankrupt, the choses in action of the wife are by operation of law transferred to the assignees. The principle is that he is as much liable as her debt at the date of the commission, as for his own, and her debts are discharged in the commission.

The husband may purchase these choses in action in making a competent settlement on the wife. This must not however be a settlement of a portion in lieu of dower, there must be an agreement, express or implied, made before marriage.

1 MS. 472. 418.
2 MS. 475.
1 MS. 476.
2 MS. 477.
2 MS. 478.
2 MS. 479.
2 MS. 480.
2 MS. 481.
2 MS. 482.
2 MS. 483.
2 MS. 484.
2 MS. 485.
2 MS. 486.
2 MS. 487.
2 MS. 488.
2 MS. 489.
2 MS. 490.
2 MS. 491.
2 MS. 492.
2 MS. 493.
2 MS. 494.
2 MS. 495.
2 MS. 496.
2 MS. 497.
2 MS. 498.
2 MS. 499.
2 MS. 500.

Baron and Feme

Wife's choses in action.

* Must see 9 Cas. 87.
1 Cas. 878.

Articles of agreement to settle an estate upon the wife, have been also holden to be a purchase of the wife's choses in action. For these articles would be decreed to be executed as O.T.

Weston 123.

2 Des. 500.

591. 879.

Will. 179.

4 D. W. 12. 202.

2 D. W. 521.

1 D. W. 172. 203.

It may happen that the husband cannot collect at law: but it is compell'd to go to Ch^o to collect the wife's choses in action, as where they are holden by others in trust for the wife. Ch^o of Ch^o will never compell the trustees to give up the bonds &c, unless the husband will make or agree to make a competent settlement on the wife. This may be however generally waived by the wife.

It is common however for Ch^o to allow the husband to receive the interest tho' he makes no settlement. This is in the maintenance of his family. Ch^o of Ch^o will exercise discretion in this case.

3 Ch^o 21.

2 D. 220.

1 D. W. 582.

1 D. W. 238.

1 D. W. 238.

Case note.

The assignees of a bankrupt are in case consimili in the same situation as the husband.

They must make a provision for the wife, if she wants claim the aid of Ch^o to give the beneficial interest. But it is otherwise if the husband conveyed for a valuable consideration these choses to the assignees. It seems to me there is some incongruity in these decisions with the principle in the latter case. For here in a circuitous manner the husband is allowed to avail himself of his species of property, which otherwise he could not do without making a suitable provision for her.

Warner is m-

for Ch^o

1 D. W. 400 note

2 Des. 500

Posterior 3 D. W.

to D. W. 400 note

Case note

1 D. W. 172.

1 D. W. 172.

2 D. W. 172.

1 D. W. 172.

2 D. W. 172.

Wife's choses in action.

Suppose the trustee is willing to pay, or deliver up the chose in action to the husband, Ch^y will never interfere to prevent this. They only interfere when the parties are compelled to apply to them.

20th 240
in Ch 41
20. 11. 639.
20. 11. 11.
20th 67. 220
See see
10 Rem 578
20th 407.

It has been determined in one case, that money (not her separate property) in the hands of trustees for the benefit of the wife on her death belongs to her exec^r.

It is difficult to perceive the principle on which this decision rests. It appears to me that the money ought to go to the exec^r of her husband, if he wishes to make a suitable provision for the wife. She it must have considered this as a chose in action which is certainly incorrect. Tho' if this were true the decision on merits undoubtedly have been proper.

1 Ber 181.
2 Ber 574.
1 Ves 581

The rules which I have been considering are the rules of the Com. Law. Those which have been introduced by Stat will be noticed.

It is now settled that the husband is the rightful administrator of the wife, and in that capacity receives her unadministered choses in action as assets. After he has administered & paid off the debts, he would be obliged to account for the residue to her next of kin. But by Stat of Ch^y he is made entitled to the residue, & no longer liable to account.

But in some of the States there is no such statute as the 29 Ch^y. the question then arises, whether he is obliged in those States to account.

Baron and Feme

Husband's right, as administrator to the residue of the wife's personal property, count with the next of kin, as at Common Law, or when there is no one in Eng under the stat entitled to the residue. I once raised the question in Massachusetts but the case was compromised without a decision. I believe it is still depending in Virginia.

46. 51.
1 Rot. 190.
1 Rot. 2, 62.
Moore 34.
10. 10. 31. 8.
582.
3. 1. 526
1 Nov. 15.
1 Miss 188.

My opinion is that the husband has no right to take the residue; but when there is no stat; is bound to account like any other administrator. Hence the stat of Ed⁴ if any other person should administer, on the refusal of the husband, he must account for the residue with the husband. The question which this stat was made to decide, has arisen under the stat of Distributions.

The most ancient doctrine on the subject of intestacy was this -- that when a person died intestate, the king as pious^{ty} patron held the legal title to his personal property in trust as to two thirds for the relatives of the deceased & the other third was to be disposed of for the benefit of his soul. As the king could not in person execute this trust, it was given to the clergy or the most proper persons. They applied the property to what they called pious uses and being accountable only to God, defrauded the creditors and widows and orphans.

2. Henr. 1. 35. 757.

The first check given to this abuse was by stat of Hen. 2, which gave an action to executors against bishops to recover their dues.

Husband right over the residue of the wife's choses in action. Afterwards the stat of Edw 3 enabled them (i.e. the bishops) to appoint Administrators, who were to be the next of kin & friends of the deceased, and who were now to give the dower which formerly belonged to the husband. Under this stat the husband was holden to be entitled to the administration of his wife's estate. By a subsequent stat of Hen 3 "the administration was given to the widow next of kin."

But in the practice of appointing the husband Administrator to his wife was continued.

The administrators claimed, as before the Statute, so were not compellable to account, as administrators to the residuary of the deceased, they were entitled to the same immunities. And this was so whether the husband as well as Administrator, and to distribute the residue, which was left in their hands.

Therefore this case, the stat 22 Hen 3 was enacted confirming the Administrator is entitled to the next of kin of the deceased. From this case it appears that no new obligation was imposed by this stat, but only a remedy given for enforcing, what before ought to have been done. So that the subsequent statute exonerates husbands from accounting over not in appearance, but in execution of the Com Law.

In some of the Statutes there is no Statute giving greater privileges to the husband, regarding his estate than to other administrators.

Marson and Dame.

Life's chosen action.

1000 p 49.

Suppose therefore that if the ^{due} deduction ^{is} true
 wife is correct, there can be no question, but that
 the husband must distribute like other administrators.

1000 p 47.

The separate property of the deceased wife
 by force of the same stat goes to the husband, as
 administrator in the same manner as her other prop-
 erty. In the case cited the Chancellor very in-
 correctly says, the husband takes it as next of kin.
 This is certainly not true. He takes under the stat.

1000 p 47.

Suppose an annuity is granted to a feme
 sole, who afterwards marries & dies after arrears
 have accrued, these arrears whether accrued be-
 fore or after coverture are given to the husband
 by stat 2 Hen 8. He is entitled to arrears accruing
 after coverture by the common law, they being
 the usufruct of real property, to which the hus-
 band was always entitled. This stat being en-
 acted before ^{the} ~~our~~ emigration of our ancestors,
 it would seem was brought with them to
 this country.

Right of the husband in the wife's judgment,
 her chattels real — and her real property,
 during coverture and afterwards.

When a judgment has been recovered in the name
 of the husband & wife for a debt due to the
 wife, if the wife dies, before the judgment is col-
 lected, the judgment goes to him; but if he dies before
 it is collected, it belongs to her & her executors.

Husband's power over the wife's property &c. awarded. This latter part of the rule is analogous to the law of Baron & Bone in other cases of choses in action mentioned above.

Now, what principle is it that the husband becomes entitled absolutely on the death of the wife to an uncollected judgment given on a debt due to her? He takes it unimpaired, by the *jus accrescendi* — the mere joint debt, & joint owner of the judgment. There is certainly no other principle on which he can receive an absolute title. In some of the States the *jus accrescendi* is exploded, & in those states if the symmetry of the law is preserved, the husband must account for such a judgment, as for other choses in action uncollected by the husband.

If he is assigned to the wife it will be assigned in his hands, & where the stat 22 Ch¹ is not in force he must distribute it with the undivided share as in other cases. This principle has been decided & decided in *Down*.

Suppose a husband sues a claim against his wife to arbitration & an award is made that the money be paid to him, & he dies before it is paid, his exec^r is entitled to it. If he could sue in a Ct without joining his wife the rule would then be the same. The award extinguishes the debt only to the wife, & creates a new obligation to the husband.

The husband has a power to receive an

Wife's chattels real.

the chose in action of the wife during coverture.
But if the wife has an annuity for life, & the
husband releases that to the grantor (the annuity
being real property) that release will not render
his wife's estate liable to his death from recovering it.

Husband's power over her Chattels Real.

By marriage the husband becomes en-
titled to dispose of the wife's chattels real as
of her chose in action. The wife's chattels real
may be taken on execution during her life, in
recovery against the husband, tho' her chose in
action could not be.

Mer 273

C. L. 300. 551. 46.

1 Mol 341. - 344.

318.

McC. 418

plow 260.

Abt 3

If the husband dies without having
disposed of the wife's chattels real, they belong
to the wife; but if she dies first they go to
the husband. In what principles do Chattels
real on the death of the wife go to the hus-
band, for the law is different with regard to
her chose in action.

It has been made a question whether this
law exists in those states, where the joint ac-
crescendi is not in force. The elementary writers tell
us, that the reason of the husband's taking the
wife's chattels real is that the husband & wife
are in the condition of joint tenants, with re-
spect to her chattels real. But I apprehend that
this position is wholly unsound and that the
husband & wife cannot be joint tenants.

Wife's Chattels Real.

Joint tenancy requires an unity of time, and that the estate be created by the act of the parties - and there must be also an unity of interest. But here the title of the wife accrues before that of the husband, & his right accrues by act of law, & in it's extent is inferior to hers, since she has the fee. The truth then is, the common law provision must apply to us as much as in Eng.

The husband may, for a valuable consideration dispose of the wife's chattels real by lease, which to operate after his death. But such Co. L. 551. a conveyance if voluntary would not be binding. But if he leases the term for a valuable consideration & dies, the rent is to be paid to his exec^r. Co. L. 287.
Veph. 5.
Hou. 290.
1 Mol. 224.
Blaird 415.
Mason v. Heath.

The husband married a wife, who had been for 20 years, & made a lease for 10 years for ^{2 dies within} 10 years a certain sum payable to him and his exec^r. The Ct in the case cited seemed to be very much puzzled to determine, to whom the rent was to be paid. According to the rule I have laid down, the husband's exec^r would be entitled to it. I cannot account for their decision. Two of the justices determined that the rent was gone proceeding on the false ground supposed, that the rent accruing on the term was real property & payable to nobody. The other justice with no more correctness, held that the wife was entitled to the rent, for the remainder of the husband's lease.

Baron and Feme.

Under Chattels Real.

3 Nov 104

If a feme possessed of a term marries as
alien he acquires no right to dispose of it.

1 Kent 289.

2 Bl Ca 38.

1 R 182

Pulst 115.

Mun 7.

Co Bl 207.

The husband has the same power over the
trust of a term belonging to a wife (not to her
separate use) as over the legal estate.

Let it the term is settled upon the
wife, for her maintenance after her husband's
death, he has no control over it.

4 Bl 118.

The only reason why the wife's chose
in action cannot be levied upon is that they
cannot be sold. But if the husband absconds,¹
apprehend they may be taken by foreign Attachment
in Connecticut.

1 Ast 346.

Co Lj. 381.

1 Ast 592.

2 Ast 87. 220.

2 B. W. 636.

3 B. W. 11.

The wife was dispossessed before
marriage, and during coverture dies without ob-
taining actual possession, in Eng the husband
could not be entitled to it. A mere possibility
has been placed upon the same footing. I sup-
pose this would not be here law, as we an-
nally require ownership for a not seized.

* Co Cur 456

The husband has no power over a chattel
real holder by the wife or executrix.

The husband has no power over the sep-
arate property of the wife, whether her
interest is a chattel or a freehold.

What are the husband's rights in the wife's Real Estate?

The husband by the marriage acquires a right to the usufruct of the wife's estates of inheritance or freehold during the coverture. He has then a freehold estate or one which may endure for his life. The fee remains in the wife as before. For any injury (by cutting down trees &c) which is an injury to the inheritance the wife must be joined in the action. But for an injury to the usufruct, the husband alone may bring the action. Co. L. 387.
Dalm 513.

A wife being lease for life, the lease afterwards made another lease for life in the name of the husband and wife - Did the wife waive her first lease? No! she could not contract being under coercion of her husband. The second lease does not then make the husband & wife joint tenants. Co. L. 272.

On the death of the husband in the life of the wife, his exec^r takes nothing but the emblements Co. L. 381.
Doctor & Sturton.
Dialogues 1. c. 4.
wife Real Property. grown on the land. To take these he has a right to enter. On the death of the wife without ever having been before born alive - the husband has no further title to the estate.

Husband & wife holding lands in right of the wife are disseised, & the ^{wife} disseisor dies, the husband's right of entry is taken away. But if the wife survives her husband is her right of entry taken away? It is not. It is not. Suppose the disseisin was before the marriage, & after the marriage the disseisor dies, her right of entry is taken away as well as that of her

Co. 2. 22.
S. 7. 21.

Husband right to the wife's real estate.
husband. For she might have entered before marriage.
After the law of Limitations has once begun to run
it runs stop.

Gavelkind lands do not require the birth of
a child, so enable the husband to curtesy. In Kent and
Lancs were all holden originally under the charter in
gavelkind; and the tenure is not altered in this respect.
as to the custom, tho' as to name it is by stat. Per-
haps it is now too late to raise the question, after an
acquiescence for so long a time, whether the birth of
issue must be necessary.

See in a last 208d

3 P. 10. 229.
1. 11. 634.
2. 11. 47.
3. 11. 895.
1. 11. 298

The husband shall have curtesy in the wife's
Estate of Redemptio, & in any trust estate of inher-
itance acquired by the wife.

If a feme before marries the husband is entit-
led to the rent, which comes in place of the woman.

also 215.

It is laid down in Palmer that a payment
to the wife does not discharge the tythe, even if he has
no notice of the marriage. This I apprehend cannot
be reconciled with the principles in similar cases.

Went in arrears which accrue before coverture
is like any other chose in action, which belongs to
her, untill reduced to possession.

Co. L. 145.

By the C.L. no taker is imputable to a
wife to bar her interest in lands descended to her dur-
ing coverture. But if there be a condition annexed to
the grant, on the non performance of which the
deed is to be void, or of no effect - if the condition is

rights acquired by the wife in point of property, not performed at the time, tho' the grantee be a feme covert, the estate is at an end. This is the distinction that prevails in all cases.

If an estate is given to husband & wife as joint tenants, & the husband dies, before the crop has been sowed. Who is entitled to the emblements? The authorities are contradictory. But I think the governing principle in the cases of emblements decide this question in favor of the exec^r of the husband. Who was entitled to the emblements? the husband without doubt.

If a feme sole sows in fee maries, and the husband dies before reaping the crop sown the widow is entitled to the emblements.

Rights acquired by the wife in point of property by marriage.

The wife by marriage obtains during ^{the life} coverture of the husband only a right to maintenance (in point of property); but upon the death of the husband intestate, she is entitled to one third of the residuum of his personal estate, if he left children, & to one half if he left no children. This right is founded upon the custom of distributions, which has been universally adopted in this country.

But there is one species of property called her paraphernalia, which consists of her clothing, jewels & ornaments, bracelets, watches &c on which it is necessary to make some observations. The two former of these ^(her necessities) are strictly her own & not liable to be taken, during coverture for the husband's debts on execution.

Baron and Feme

Wrights acquired by the wife in respect.

But as to the latter the rule is different.

There it is true cannot be devised away by the husband, but still he may deprive her of them during coverture. But if he dies they vest in the wife, liable on failure of other assets to be devolved, & taken by the exec^r to pay debts. She is preferred however to legatees or any volunteers.

3rd 570

There are less over & above her children

2nd 590.

The wife is often viewed as creditor to her husband, in respect to her paraphernalia taken in during coverture, and pledged for payment of his debts. She is preferred to all cred^rs in such a case.

Where lands are charged for the payment of debts and on the failure of the personal fund the wife's paraphernalia are taken - she shall be allowed in R^t to stand in the place of the cred^r, & come upon the lands to the value of her paraphernalia.

3rd 580 n
1st 589.
1st 590. 2nd 590.
3rd 590. 5th 590.

So too where the personal estate has been all taken by the specialty creditor and her paraphernalia are taken - she may stand in the place of specialty creditor, & come on the lands.

R^t of R^y have in such cases gone so far as to give an injunction to prevent the sale of the wife's paraphernalia.

If the wife should never take her paraphernalia herself, the executor is not entitled to return - but upon her death they will go to the next of kin.

Rights acquired by the wife on the death of her husband.

In some of the states the real estate is made a lien in the hands of the exec^r after the personal estate is exhausted for payment of debts. Suppose in any of those states, the personal fund is exhausted, can the executor take before both funds are exhausted? This may be a question which will make some sense in our courts.

Rights acquired by the wife on the death of her husband.

By the death of the husband, the wife becomes by the common law entitled to one third of all the estate of inheritance, of which the husband was seized during coverture. In this case the common law did not require actual seisin - because the husband could procure that at any time.

This estate the husband cannot deprive the wife of, by devise or by any alienation, in which he little down she has not joined. The estate must be such an one as if she had had a child, that child could have inherited it, tho' it is not necessary that a child should be born.

Alterations in the common law, have been made by Statute.

The husband, after marriage leases for a term of years all his estates of inheritance - still the wife on his death shall be endowed of it. This creates a question in Count^y. Here the wife is only entitled to C.L. 25 down in an estate of which the husband disposed.

Wife's right of Dower.

Notwithstanding the case the husband here dies seized, but the words of the stat are "of which he died possessed." But I apprehend that the tenant's possession would be considered as his possession.

He has it compellable to assign Dower to the widow within a reasonable time.

The wife may be barred of her dower by alien-
19 Decr. 443. age, or elopement with an adulterer. This however will
30th 218. not discharge the husband from the performance of
any settlement on marriage articles.

The most usual mode of baron's Dower is the settlement of a jointure upon the wife before marriage.

This jointure must be real property i.e. an estate of inheritance or for life of the wife in lands.

It must be so created that the wife co instantly on the death of the husband can immediately enter upon & enjoy. It must be a competent settlement & a legal estate made directly to her, & not through the intervention of any trustee.

It must be declared in the instrument which conveys it to be in lieu of Dower Else it will be considered merely a marriage settlement.

If it should happen that the title to the lands given in jointure is defective, the wife has a lien on the other lands of the person who settles it.
15th 440.

Where the jointure was settled after marriage & in performance of articles entered into before it, it is at the option of the wife on the death

Wife's right to Dower.

of her husband to take the jointures or resort to her Dower.

The wife may, after marriage join with her husband, in conveying a fine to bar her of her marriage rights. A man makes a voluntary settlement of lands on his daughter, & then marries a second wife & settles the same on her as a jointure. She shall hold them for she is preferred even to creditors.

If a man by will gives property to the wife in lieu of dower, she may exercise her choice, whether she will accept of it or not instead of her dower. His legacy in case of acceptance, shall not abate with the others, on a deficiency of assets.

A practice has grown up & prevails very extensively of giving in a man's last will one third of his estate to his wife, & then disposing of the rest. These wills are made by ignorant men, & no mention is made of the wife's taking the third devised to her in lieu of Dower. On strict principles, would not the widow be entitled to her dower, besides the third devised to her?

A covenant to settle a jointure is not a voluntary covenant.

It was determined by Chancellor King that a bond given for a sum of money, in trust for the wife's livelihood, was a bar of Dower. But the question of her election or refusal did not arise in the case.

It is questionable, she might have repudiated the provision and claimed her Dower if she chose.

1 Vesey 219.
By 2d Mr 221.

2d Mr 225.
2d Vesey 365.
2d Mr 221.
2d Mr 221.
2d Mr 221.

Covenants
1875.
2d Mr 2.

Marson and Feme.

Wife's right to Dower.

But the opinion of the Chancellor to be collected from the case was that she could not be entitled to both.

It has been made a question whether a jointure made in favor of a wife who is an infant, will bar her dower. The objection is that jointures are not to be bound by their contracts. But a jointure cannot I think be considered in the nature of a contract; it is a provision made by the husband for the wife. And I apprehend, even if it is to be considered a contract, that the wife, tho' an infant ought to be bound by it, for if the law allowed her to make the principal contract, i.e. the marriage it would seem reasonable, that she should be bound by those also which are incident to it.

Whatever is given to the wife without mentioning that it is in bar of Dower, is considered as a gratuitous gift, & not a jointure.

The wife has a right of Dower in all the mortgaged estates of her husband. And if they were mortgaged during coverture, without her consent, she need not redeem in order to entitle her to Dower.

Tho' if the estate were mortgaged before coverture or after^{ly} with her consent, she would be obliged to redeem, if she wished to be enfranchised of it.

If she pays the whole amount of the mortgage, she will be entitled to hold the estate until the two thirds of the mortgage money are paid to her. But as this as she has the usufruct of the estate no interest is to be paid her.

Wife's right to Dower.

If the husband is convicted of treason the wife in Eng^d is not endowed.

If lands are settled on the wife by way of purchase, & then mortgaged without her consent, she may waive the jointure & resort to her Dower. If she accepts of the mortgaged premises, the heir must redeem the estate, & she will take it unencumbered.

If a man leaves an estate for life, & then marries and dies, the wife is not entitled to Dower in it.

It has been a question whether the wife shall be endowed of an equity of redemption, where the mortgage is made before the marriage. Sir Joseph P^{er} 2^d M. 252. 1st B. 2^d. 1st M. 606. 1st M. 606. 2^d M. 252. He decided that she should, but this opinion has since been overruled. The Supreme Court in Court have unanimously decided that the wife is endowable of such an equity.

The wife of mortgagee can never be endowed of the mortgaged premises. True he is the legal owner, but he holds the legal title merely as a security for the money lent. In reality what it is personal property. The mortgage is trustee for the mortgagor. And the wife of a trustee ~~estate~~ can never be endowed of the trust estate. 1st B. 2^d. 1st M. 606. 2^d M. 252.

This principle will not however be admitted to cover fraud.

Testators often devise lands to pay debts and legacies, & then to another person in fee. If the Devisee dies before the debts & legacies are paid she is said never

Baron and Feme.

Husband's right to property, accruing to the wife during Coverture. to have been seized. But the law considers him as being seized immediately on the death of the testator, & the wife will have dower, on the reversion after the trust is fulfilled.

2 Brev. 96.

If the husband sows his land and dies (where he & his wife are jointenants) she having a right to Dower takes the emblements with her Dower.

Husband's right to property accruing to the wife during Coverture.

If personal property is given to the wife, (not to her sole & separate use) during coverture, the husband takes it absolutely. If he dies before it is paid, it goes to his executor.

2 Brev. 670
Humble. 385.

If a bond is given to the wife during coverture, the husband may sue upon it, without joining his wife. But if the husband dies without collecting it, it is said in Ves that it goes to the wife. But Douglas lays down the rule (& I think correctly) that when the husband may sue alone it is considered a bond, it goes to his executors. And as to property accruing during coverture, the husband need not join his wife, in an action to recover it.

The law always allows the wife to join in an action to recover on a claim of which she is the meritorious cause.

Baron and Feme.

Damages for injuries to the wife's person, or property.

These belong to the wife, not to the husband, whether he is joined with her or not.

If the husband dies before or after judgment they belong to the wife, since she must be joined in the suit. If she dies after judgment they go to the husband.

In case of assault and battery, the wife may bring an action for smart money, and the husband an action of *Querrel per quod servitium amittit*.

1st 200.
2d 120.
3d 240.
4th 500.
5th 250.
6th 97.

Whatever is acquired by the service of the wife belongs to the husband.

In case of slander the husband may sue alone. In crim. con. the action is in form, *trespass vi et armis* but virtually it is an action on the case. The wife is considered as having no will. The husband sues alone. If he connives in the adultery he is entitled to no action.

2d 257.
1st 261.
M. N. 182.
Mull 27.

This action can never be maintained, when the husband and wife live separately. The husband has then no right to the person of the wife, or to her services.

Mull 98.
2d 205.
M. N. 552.
Mull v. Hartley.
Dun.

She has by the articles renounced his right to her person and therefore receives no injury from her seduction.

The renunciation of his marital rights binds him as far as the articles extend. If he renounces his right to her property, he can bring no action concerning that.

The damages recovered in an action of crim. con. are to be proportioned to the previous character of the wife, and other parties.

The marriage must be proved.

[Signature]

Baron and Feme.

Power of the husband over the wife's person. —

This is difficult precisely to ascertain. It was formerly thought that the husband had the same power to chastise his wife, which the master has to chastise his apprentice. But this has been otherwise decided in Court.

He 855. 248.
 Plowd. 101. 122.
 Reg. 871.
 113.
 1201.
 1683.
 1901.

No action can be maintained by husband & wife against each other, but if one is injured by the other, the remedy must be sought by a public prosecution. Where the wife elopes from her husband, he may seize & bring her home. And if she is a vorago and destroys his property, he may imprison her. But when she is maltreated and escapes to her friends, the law justifies them in protecting her.

to & crimes

Husband's liability for the debts of the wife &c

I have already noticed the husband's liability to pay the debts of the wife. The subject will now be more fully considered; together with his obligation to perform her duties, and his liability for her torts and crimes, and how far she is excused for her crimes.

His liability for her debts.

For those the husband is liable during coverture whether he received any property with her or not.

If a judgment is obtained against him, during coverture for a debt due from her before marriage, he is bound to answer this judgment at all events. By the judgment the debt is transferred to him.

1 Rol 331
 3 Mod 186
 Dalb. 143.
 38. W. 409.

Husband's liability for her debts.

The husband is not liable on the ground that he has received property by his wife, for then he would be liable after the coverture determined. And he never could on this ground be liable farther than to the extent of the property received by the wife marriage. But the debt survives against the wife after the death of the husband, tho' her property does not revert in her. This is I believe the only instance, when property is transferred by law so as to insure creditors.

If the wife dies tho' her husband has received & enjoyed her personal property &c he is not liable to pay her debts.

The true ground of the husband's liability is not the inability of the wife, or his receipt of property by her but he is made liable, because the wife can in no civil suit be taken in execution, or imprisoned without her husband. Were she imprisoned she would have no means of extricating herself, but would be absolutely dependent on the caprice of her husband. He must therefore be joined with his wife, that execution may issue against both, and that they may not by imprisonment be separated from each other.

If the husband is discharged or escapes, the wife must also be discharged. For the law will not suffer her to be imprisoned alone. If the wife is first taken in execution she cannot be retained in custody alone, longer than for a reasonable time to make search for her husband.

See 1109, 1242.
1 Wils. 124.
Barrow 96.
2 H. K. 720.
1 Gent. 22, 51.
Selken's Ca 209.

Haron and Jeme.

Husband's liability for the wife's debts.

If both ^{wife} are taken, & the husband procures bail for himself, the ^{wife} must be discharged on common bail. Tho' if the wife procures substantial bail herself, she may be discharged without him.

If the husband is acquitted, and the wife remains liable by the verdict or judgment issued against her, for it would be useless. For the wife cannot be imprisoned without her husband, and this is the true ground of his liability for her debt.

When this reason ceases, his liability ceases. His death discharges his representatives, and her death discharges him.

But it is said there is a late case, where a married woman who lived on separate maintenance, was discharged on common bail, tho' the husband had renounced his right to her person. But the case cited does not appose the ground of his liability for her debts (supra). The only reason why the husband has no claim on the person of his wife, living on separate maintenance, is to be found in the articles of agreement. But in this case there was no covenant renouncing his right to her person. He might therefore have claimed it at any time.

There is one case, where the wife may on civil process be imprisoned alone. This is where the suit is commenced before marriage against her, a judgment obtained afterwards. Execⁿ may then be issued against her alone, and she being taken in custody.

Husband's liability for the wife's debts.

In the case cited in the margin from 2 Hides 158.

Stiles, the action was brought against the husband and wife for a slander by the wife. The husband dies, and the suit then moved against the wife alone. She married a second husband, and the Ct inclined to the opinion that the suit against the wife abated. But this is opposite to principle, and to the current of authorities. The debt here, by her own act abates the plaintiff's suit.

It may be said that in one case, the husband's liability for his wife's debt is not discharged by the coverture being determined. It is admitted ¹⁸¹¹ 337. That if judgment is obtained against the husband and wife during coverture for a debt due from her, the husband is liable after her death. But the rule in this case is not broken. The reason of his liability is, that the debt has been transferred by the judgment to the husband.

A woman whiles hale bought articles and gave her note for the value. They came to the use of the husband - and after her death compelled him to pay ¹⁸¹⁷ 60. the note, tho' it was not collected during coverture.

The wife's debts due before coverture are discharged by the husband's bankruptcy. This is a provision made in favor of the wife, since her chance of having any property from her husband is gone. ¹⁸¹¹ 229. ¹⁸¹⁷ 237.

Indeed her choses in action are transferred to her aponeer under the composition.

[Signature]

~~General~~. Husband's liability for torts committed by the wife before coverture.

1 Leon. 212.

The husband is liable for all torts committed before coverture by the wife, if the damages are collected during coverture. But the wife must be joined with him, for she is liable, and her liability survives after the determination of the coverture.

1 Hol. 5.

If the husband dies his representative is not liable, for *actio personalis moritur cum persona*.

1 Hol. 251.

1 Lev. 142.

6 Bk 270.

For torts committed during coverture in the presence of the husband, the wife is not liable. The husband is liable alone. It is said she is under his coercion. So if she commits the tort by his direction, tho' not in his presence the rule is the same. This is true of no other relations in society but that of husband & wife. All other agents are liable for their torts, tho' committed by command of another.

But for torts committed by the wife not in the presence of the husband, nor by his direction nor acquiescence, she is liable with her husband who must be joined in the suit. And if they are not sued during the coverture, the right of action survives against the husband.

See also
by the wife.

There is a query suggested by the editor of Baumer's reports, whether the husband is bound by a contract made by the wife, under pretence that she was a *feme sole*. Such a contract of itself, does not bind him. But if the goods purchased come to his

For the wife's offences against the law of the land
his use, he may be made liable. But his liability does
not arise on the ground of a contract by the wife.
Since by denuding the coverture she ceased to act as his
agent. But the husband is liable with her on another
ground. This contract of the wife is doubtless a
tort, for which both are liable during coverture.
For the wife's offences against the law of the land. —

Where the punishment is a penalty the husband
is liable. But where imprisonment or corporal punishment is
inflicted she alone is liable. If the wife is fined for a
riot, trespass, &c. the husband is not liable. 12 R 68

Generally the Duties due from the wife before marriage
must be performed by the husband after marriage. As
if the wife has children which she is bound to main-
tain, the husband must maintain them during coverture.

If the wife was not bound to maintain them before
marriage, the husband is not bound to do so afterwards. 2 R 118

In the case cited from Term Reg. it was holden that
the husband is not bound to maintain a child of
the wife by a former marriage. This is laid down
as a general rule. But so far as it goes to excuse him
from the maintenance of children, whom she was before
bound to maintain, it is clearly, I think a violation
of the principles of Baron & Deme.

But there is a well established exception to the
rule that the husband must perform the duties in-
cumbered on the wife before coverture.

He is not obliged to maintain her parents
if she was liable before coverture. This rule was
supposed

suppose adopted for the purpose of maintaining domestic tranquillity. But it has always been complained of. Sons in Law in this District generally execute this duty of their wives of their own accord, and rarely avail themselves of the rule.

Reg. 114.

A man married a feme sole who had a large personal estate and she died leaving a pauper grain child. The Ct held the husband liable. This is an unusual case.

Reg. 115

If husband and wife commit an offence together which is malum prohibitum merely, there is no offence of the wife.

Howe v. B.

125. 2. 3. 4.
Hals. 125. 2. 3. 4.
57.

All offence against property only, however atrocious - committed in like manner - stands on the same ground.

But this rule does not apply to acts mala in se i.e. such as would have been crimes in a state of nature. So the rule as it relates to mala prohibita there is one exception viz Treason for which the wife is liable, tho' committed together with her husband.

There is one case, in which the wife is hologen liable, tho' she may be presumed to act under the coercion of her husband. This is where they keep a bawdy house. The law supposes I conclude a willful neglect on her part.

Id.

The wife cannot be an accessory after the fact, where the husband committed a felony, but she may be an accessory before the fact.

Contracts of the wife which bind her husband but not herself. —

The wife may act as attorney for the husband, & when she acts in that capacity, he is bound.

There are two grounds on which the husband is liable for the wife's contracts. 1st the agent of the husband, either before or after the contract is made. 2^d Where ^{he} there is not agent, ^{but} it is just that the husband should be bound.

Id. 128

The husband will be bound by all such contracts of the wife, as she has been in the habit of making; & he of ratifying.

So he will be bound by all such contracts as wives in the country usually make. It makes no difference what the contract is, nor if the husband wife purchases articles for the use of the family, in this country, the husband would be bound by the contract.

1 Mol 358.

Id. 120.

Id. 845.

Whenever the avails of the contract come to the use of the husband, and are voluntarily received by him he is bound, whether the wife had any authority or had been accustomed to make such contracts or not.

The law raises an implied promise in such case, that the husband shall do what justice requires. There is indeed no agent in this case. But indebitatus assumpsit lies in many cases, where there is no express or presumed agent, as where money is obtained by fraud or violence. So also the husband may be liable for the contracts of his wife, on the ground of the peculiar situation of his family. As where he has left

Id. 127.

Wife's Contracts.

the country &c, and the business of the family devolves on the wife; or where the husband has become a lunatic; and in this case it is to be remarked, there can be no agent.

The husband is also bound by the wife's contracts for necessaries for herself, when he refuses or neglects to provide for her. This is on the ground of his duty, not of his assent. He is bound by such contracts even if he turned her out of doors, and commonly forbids all the world from trusting her. But if she leaves him without reasonable cause, he is not bound, unless he refuse to receive her again. The necessaries must be suitable to her rank in life.

If the wife leaves the husband for reasonable cause, he must pay her contracts for necessaries. And acts of Ch^r will, on petition of the wife in such case allow her a separate maintenance suitable to her rank, to the portion she brought &c, and the husband is then no farther liable than to the extent of the maintenance.

If the husband offers to be reconciled, Ch^r will suspend the payment to the wife and order the money to be paid into Court. If he uses her well, it will be returned to him; if not, she will have it again.

If the wife elopes with an adulterer, the husband is not bound to maintain her, nor is he obliged again to receive her. By such an elopement her Dowry is barred, it is said.

1 Ch. 2. 4. 184.

2 Vern 433

671. 782.

174

Wife's Contracts

But a pointure would not be bar, and therefore I think it doubtful whether her dower would be. It is laid down in the books that if the wife elopes with an adulterer, and receives credit for necessaries so, from one who has no notice of the separation, the husband is not liable. This rule tho' well established does not appear to me to accord with principle. When master and servant disolve their connexion the rule is otherwise.

La 847, 900.
6 D. R. 600

6 D. R. 1000.

10 D. R. 220.

If an adulteress lives with her husband, he is bound by her contracts for necessaries. It was holden where the husband of an adulteress went away, & left her in his house with the family that a creditor who knew of her manner of living could not recover of the husband on a contract entered into by her for necessaries during his absence. This case on point of principle is opposite to the last rule.

When a debt which the husband was bound to perform for the wife, is discharged by another, the husband is obligated to pay for it. As if the wife dies and a third person buries her.

Though by an elopement with an adulterer the wife forfeits her dower, yet if her husband receives her again it is restored.

The husband is not bound by the contracts of the wife for necessaries, while she lives separate from him with a reasonable maintenance allowed her pro. 18th 118. 119. where the separation is a matter of notoriety. But if 4 Benc 217. no separate maintenance is allowed her, the husband is liable.

Wife's Contracts.

It was decided in one case by Lord Hale, where the husband and wife agreed to live separately, that no separate maintenance was allowed her, that the husband was not liable. The husband in that case had no property — but he renounced his right to her personal services. If she became unable to work, he would have been liable on his contract. If the public are compelled to support the wife, they may resort to the husband in all cases.

3 Mod 171.

2 Thom. 283.

S. 8.

If the husband prohibits a particular person from trusting the wife for necessaries he is not bound by her contracts with that person.

2 Ld. 118

It has been held in one case that if the wife contracts for necessaries, and before using them sells or pawns them the husband is not liable. I doubt the correctness of this decision. The dicta of judges have since been opposed to it. If it were the only ground of the husband's liability that the articles came to his use the rule would be correct, but he is liable on other grounds. She becomes liable at the time the contract was made, and no subsequent act of the wife ought to discharge him.

6 Ld. 136

A wife cannot bind her husband by deed unless she has a special authority to do it. But if she had a power to make the contract the husband is still bound. The security, i.e. the bond is void otherwise.

Palk 387.
P. W.
Bent 105.

If money is loaned to the wife to purchase necessaries, and she does purchase necessaries with it, still the husband is not bound at law to repay it.

Debts due from the husband to the wife at the time of marriage.
 That Sir of Bth holds him to be liable, and on applica-
 tion to them, the creditor will obtain complete re-
 lief.

Suppose the wife is imprisoned for the com-
 mission of a crime, who must maintain her?

The husband in such case is not bound to furnish her with necessaries. The public must supply her - for she must not starve.

Debts owing from the husband to the wife at the time of marriage.

Are such debts discharged by the marriage. The third has been a matter of dispute it is settled that they are. And the rule is the same as to all debts which become due during coverture.

But if the evidence of the debt remains entire does it not survive against the husband's executors? As if a bond or note given her before marriage is found entire after his death. It is settled that it does not survive to her.

But when the contract was made previous to the marriage, the debt was not to be performed until after the determination of the coverture, it was always held to remain in equity - and is now decided to be so at Law, if it is made in contemplation of the marriage, or a provision for her after the determination of the coverture. It makes no difference in what form the contract appears. The first case on the point is *Baron*. It was there held that the action might be

Debts due from husband to wife at time of marriage
maintained at Law. against the exec^r, But the Court were
divided in opinion. Applications were then laid out
to Ch^r. The same point was determined in *St. Br.*, but
Bolt. Ch^r. was opposed to the decision. But I trust what
is now established is, and question. In *St. Br.* the *St.* were un-
animous.

St.

Full however a bond given by the husband to the
wife before coverture conditioned that he will make a
settlement upon her is annulled by the marriage as a
Ch^r of Law. But such bond is good evidence of an agree-
ment to make a settlement, which will be enforced in
Ch^r. If it was considered a good bond on law money
would be recovered. That was not the object of the
parties. It was merely a consent for a settlement.

the a

Where the husband before marriage made a
provision for his wife, binding his exec^r to pay her a
sum of money, a release by him during coverture to
his exec^r broke the obligation to pay, the money was
held not to be paid.

Prin Ch 22.

A husband who had made a provision for his
wife, agreed after marriage to lay out her portion in
the purchase of lands to be settled upon her; and it
was holden that this was not such a voluntary, a-
greement as would be set aside in favor of creditors,
the agreement being for a marriage provision in order
to get possession of her portion.

Where a husband who has given the wife
a bond to leave her a sum of money if she survives
him

Conveyances by the husband to the wife before and after marriage, and articles of agreement to live separately.

him, afterwards became a bankrupt, the Ct at first refused to deliver any thing to answer this claim, as it was a contingent demand.

But in some cases where the demand has been contingent at the time of giving the obligation (as a bottomry bond) a different rule has been adopted, and the Ct it is said in the Elements writes, stops the money from going into the hands of the assignees in order to pay this bond, but in that case if the bottomry bond the ship had returned at the time, so that the demand tho' at first contingent was now certain.

Conveyances by the husband to the wife before and after marriage, and articles of agreement to live separately.

Where separate property is provided by the wife before marriage by articles and she elopes and lives with an adulterer, still an application to Ct & they will enforce the articles.

Where a contract respecting personal property is made before marriage between the husband & wife, it belongs by the marriage to the husband, unless it appears that it was meant for her sole & separate use.

But real property conveyed by the husband to the wife before marriage stands on the same ground as her other real property.

The maxim of the Ct is that the husband and wife cannot contract together. This position is generally correct.

Conveyances by the husband to the wife.
 But the reason given for it that they are one person, is a
 intrinsic one. They certainly are not one person, even
 in legal contemplation to all purposes, for the wife may
 take real property by descent or devise.

But at 6. L. a conveyance of lands between hus-
 band and wife is not valid. He cannot convey it to her for she
 is presumed to be under his control. This reason however
 does not apply to conveyances by the husband to the
 wife. Such a conveyance is not in itself illegal, for it
 may be made circuitously through the intervention of
 a third person and it is a maxim that what is otherwise
 void may be done circuitously any more than it can directly.

It is the maxim that the husband and wife
 are one person that prevents him from conveying real
 estate to her. But when the conveyance is made through a third
 person the husband may then convey real property
 indirectly to his wife and so he may convey it
 directly, tho' this would be of no avail as it
 is void immediately, he has again.

It has long been settled in Engd that the wife
 may hold real and personal property to her separate use.
 50. 101. 337. It was formerly supposed that she could not receive
 this from her husband. It is now however settled that he
 may give property to her for her separate use.

There is a case in New Williams where the wife
 sent to the husband money which she had received
 from sales of butter cheese &c., and his estate was com-
 pelled to pay it. But a voluntary conveyance by the hus-
 band to the wife is not good against creditors.

agreements to live separately.

An executory agreement by the husband to convey property to the wife does not bind him. 2 Allen 54.

The wife agrees with the husband to sell her lands, for which she was to receive part of the money for her separate use. He binds a fine and her part of the money was put into the hands of trustees for her sole and separate use -- and it was held to belong to her, so that the creditors of her husband could not take it. But his not the husband carried the agreement into execution she could not have enforced it.

Agreement to live Separately

Whoever may be thought in their country of articles of agreement to live separately, they are binding in England. And the husband is bound to the exact extent of the covenant contained in the articles.

He may agree to live separate from his wife, 10 M & B 497
and to renounce his right to her person -- Or Part all 5 M & B 547.
property which descends to her or is devised to her shall 2 M & B 90.
be her sole property. So also he may renounce the use of her real property, and then she may convey it by an ordinary mode of conveyance.

If the husband agrees to allow the wife an separation a sum of money for her support, he is bound by this agreement.

If the husband after renouncing his right to her person, again attempts to take her, she may be liberated by a writ of habeas corpus. And if after this he still persist he is guilty of a contempt.

Maroon and Geme.

Agreements to live separately.

Real property is sometimes settled on the wife by these articles.

1 Ch. Ca 118.

11 Ch 395.

But such agreement as to the husband's property are not good against creditors, tho' they cannot take it without licence, if they have other means of collecting their debts—As if the husband's friend, being aware, has agreed to pay them.

If the land is not wanted by the creditor the husband has no right to the usufruct, And if the wife saves any thing out of the profits, those savings she may dispose of by will. But the land itself does not belong to her.

2 Ch 392

It was formerly holden in some cases that unless husband & wife agree to live separate &c. & would decree a separate maintenance, even when there were no articles to make one. But these decisions have been shaken by later opinions.

9 Mod 58, 59, 60.

2 Ch 395.

2 Ch 391.

An grant of property to the wife by will does not require the words, "to her sole and separate use," in order to entitle her to it. Any words from which the intention may be inferred are sufficient.

8 Ch 22.

11 Ch 292, 293.

11 Ch 555.

11 Ch 514, 495.

2 Ch 314.

In this case see Buller's opinion concerning articles of separation.

A covenant by the husband in the articles renouncing his right in her real property enables her to convey it. This is reasonable, for she is not under his coercion, and his rights are not affected by it. If he renounces his right to her person he can then have no control over it.

11 Ch 554.

2 Ch 395.

An agreement that a provision should be made, if it should become necessary, for the husband and wife to

Agreements to live separately.

separate was holden to be binding in Eng. This decision was 2 vent 217. much disapproved of. For it was said to be impolitic ^{2 vent 217.} that to ~~also~~ encourage a separation of husband and wife.

This agreement was used in the case in East, but the point was considered as settled by the case in Remon. There the husband gave the wife a note which was to be paid in case he again abused her. They afterwards separated & the Ct held the note to be good. I am not dissatisfied with this decision, for it may preserve an innocent & virtuous wife from being abused by a vicious brutal, & dissipated husband.

If there is an agreement to live separately, the husband is not discharged from his covenants by con- ^{2 vent 217.} senting to receive the wife again. This can only be done by a mutual agreement.

In the case from Bury the question arose whether ^{2 vent 217.} the wife could dispose of property settled upon her by articles of separation. The Ct held that the property still belonged to the husband & that she was only entitled to the use of it. And even this she cannot take to the prejudice of Creditors.

If the wife in such case becomes a fornicator the husband is liable to support her, and for her trespass or slander he is liable with her.

But he is not liable for her contracts, if he allow her a maintenance. She cannot in this case be sued unless he has renounced his right to her person, for else his rights might be injured. See 1st

Contracts by which a wife may bind herself.

West 305

As a general rule I have before observed, that the contracts of the wife do not bind her. If they did the husband's rights might be affected. Besides she is presumed to be under the coercion of her husband.

But she may in some cases bind herself. And I apprehend that is always true where neither of the above mentioned reasons exist. This I conceive agrees with all the cases.

6 L. 183.

10 L. 456.

10 L. 505.

Bar & Den 65.

Where the husband has committed a crime, for which he has been banished from the realm, the wife is bound by her contracts. Here she is under no coercion and he has no right to object; being in the language of the law civiliter mortuus.

But his estate cannot in such case be administered, and the marriage is not dissolved.

11 L. 115.

10 L. 452.

2 Bar 149.

2 Lalk 645.

10 L. 508.

So when the husband has aliened the realm the wife is bound.

And the St. Edmund no difficulty in giving their opinion, that the wife of an alien king might bind herself.

Again it has been holden that a transportation for seven years of the husband enables the wife to bind herself. Yet in both these last cases, the husband's rights might probably be affected.

10 L. 5.

In the case of *Forbes and Polin*, the St. held the wife to be bound by her contracts, when she lived separate from her husband on articles of agreement. The elementary writers suppose that she was bound on the grant of the separate maintenance, although her

Contracts by which the wife may bind herself. —

But I think it was on the ground that the husband had in the agreement to live separately renounced his right to her person. This as a sufficient reason for the decision, for no right of his could be affected, and she was not under his coercion.

And there is no case which overrules this decision if it proceeded on the ground, which I suppose it did.

It did not introduce a new principle, but merely applied an old principle to a new case.

I shall mention the cases, which it is contended, overrule the decision in *Barbet & Belcher*, but which I apprehend have not had the intended effect. It is true that the opinion of the judges was opposed to that of *Manfield* in *Barbet & Belcher*, but the cases which they decided did not call for an expression of it. There was a course of decisions previous to the case of *Baron Belcher* on the same ground, and which are cited in that case. In that case, no marital rights of her then husband could be affected by her contracts, while living separate from him on articles — nor could she be supposed to be under his coercion. The wife was not liable on the ground of her separate maintenance. This would only excuse the husband from obligation, or if she was bound it would only be to the amount of her maintenance.

If the maintenance was the ground of the wife's liability, subsequent decisions have overruled that in the case of *Baron Belcher*. The wife was then liable on the ground of the articles or separa-
2 Ves. 425
2 Bl. 1399.

Baron and Genge

Contracts by which the wife may bind herself.

tion, in which the right of his person was relinquished & on this principle no cases are opposed to it.

2 D.R. 1099

In the case cited from 4 D.R. the wife being sued pleaded coverture. The application admitted the coverture, but stated that she had copped from her husband, & lived separate from him, and that the articles were furnished for her then on her own credit. Here there were no articles renouncing the husband's right to her person — the application was therefore held to fail.

4 D.R. 768

The case cited from 4 D.R. was a *propositio* for goods sold, to which coverture was pleaded. The application admitted the coverture but stated that the deft had been guilty of adultery, in consequence of which her husband had left her, & she being thus alone conducted. The application was very properly held to be bad.

5 D.R. 648

In the case cited from 5 D.R. there were no articles, it has no resemblance therefore to the case of Robert v. Poelnitz. Lawrence J. there takes the three grounds.

6 D.R. 604.

In the case cited from 6 D.R. the wife carried on the business of a haberdasher. She died leaving property. There were no articles of separation or aid therefore the property belonged to the husband.

8 D.R. 235

In the case cited from 8 D.R. it was manifestly the intention of the Ct to overthrow the decision in the case of Robert v. Poelnitz. But the case required no such decision. If the ground of the decision in Robert v. Poelnitz, was the separate maintenance, then this is opposed to it, otherwise, it is not. In this case

Contracts by which the wife may bind herself. —
More were no articles to him separately, it was therefore
rightly decided.

The queen of England may be sued alone, be-
cause she has separate property. But she could not be
apprehended, be imprisoned alone.

There is a case in the 11 East which is thought
by some to be apposed to that, which I am endeavour-
ing to support. It was an action of Trespass brought by
the wife for entering her house, and taking her goods.
The deft pleaded the coverture of the plaintiff. The plaintiff
replied that the husband had deserted her for four
years and was gone to America. The replication was
tobben to be ill, but there were here no articles to him
separately. 11 East 201.

The wife in Eng^d may however transfer her
property by one mode of conveyance. But there is no
pledged coercion in that case. The mode I allude to
is by a fine or recovery. But the wife could not in
such case contract so as to bind her husband. To con-
vey away his rights the husband must be joined
with the wife in the fine.

Where a wife joins in a lease of her lands
with her husband, the lease is not void, but merely
voidable. I know the rule laid down is, that the wife's
contracts are void. But this is not true, when applied
to her real property, there they are merely voidable. Co. Litt. 254.

In the case of a fine, it is said, the wife is
quasi-solus; and it is said to be proved by a ve-
ry

Bacon and Ferne.

Contracts by which the wife may bind herself.
 one of the 1st that the wife is not married. In that there
 is neither sense nor truth. The 1st examines her to know
 if she acts freely, especially on the ground of the coverture.

1 Leon 114.

2 Co 77

The husband & wife devised a fine of the
 wife's lands, & on error brought on account of the ~~man-~~
^{marriage} ~~age~~ of the wife, it was set aside, and the 1st held
 the transaction erroneous in law; not only as it respec-
 ted the wife's but as to the husband's interest also.

The stat of Henry 8th gives the wife power with
 her husband to make a lease for their lives.

12 Mod 101.

If a wife devises a fine, with covenants of
 warranty, she is bound by the covenants.

2 Vent 225.

2 Inst 684. 709.

2 Co 177.

10 Co 146.

1 Mod 290.

The agreement of a fine consent to buy a fine
 of her lands, has been enforced against her in Equity.
 This was for a considerable time a *quæstio vocata*.

9 Sand 230.

In Saunders it was determined that if a feme
 covert buys a fine, the land passes, and she is bound
 by her covenants.

It has been decided in Bount that the wife
 is bound by an executory contract to convey. If she is
 bound by her covenant in her conveyance, she is com-
 petent to make an agreement to convey.

10 Co 126.

Hooke title

Rene 82. 100. 20.

10 Co 220.

10 L. 2.

On 10th if a wife buys a fine of her lands
 without her husband, she and her heirs are bound, if
 her husband does not dispend. For no right of his is af-
 fected. He may however dispend if he choose. In the
 case in H. H. the wife conveyed alone but the husband
 had articles not to interfere with her real property,
 and

Contract in which the wife may bind herself. — and the wife was holden to be bound. The right of the husband's was affected, so that he could not defeat it.

If a feme covert convey her lands to another on condition that the feoffee keep feoff her, when she demands it. — and she does demand it after coverture, the condition is broken, if the land is not reconveyed. The husband did not join in the conveyance, nor did he dissent.

The husband joins in a conveyance of his wife's, ^{or he shall} estate, for the purpose of transferring his right to the usufruct. But if he has no right which can be affected, the wife may, I apprehend convey, without the possibility of the husband's preventing it. — Why then do not married women make conveyances to commence after the husband's right shall cease? Because a freehold estate cannot be created to commence in future. And such an estate cannot be limited by way of remainder, for a remainder must be created at the same time with the particular estate, but the husband's life estate commences with the marriage.

In this state I suppose a freehold may be created to commence in future. Our statute enacts that no estate of freehold shall be created by deed or will, unless it be to some person in being, or his immediate descendants. Here then I suppose that a wife (in a case where no marital right is affected) may convey to the immediate descendants of some per-

Marion and Feme

Wifes contract by which she may bind herself.
not in being.

There is no case which allows the husband to dissent to the wife's receiving real property by descent. But if she acquires it in purchase (in the limited sense of the word) he may dissent.

This is the greatest power exercised by the husband over the wife. But even in those cases the husband's rights may be affected. If he assented to the contract he would be liable to pay taxes. Or if it was a life estate, he would be liable for waste. It is right therefore that he should have the power to dissent, and the reason is stronger, why he should not be bound by a lease to the wife.

If a feme covert executes and delivers a deed of her real property, and after coverture determined redelivers the deed she is bound.

The Act in the case cited seemed to proceed on the ground that the delivery during coverture was void — But Pash was not her signature and the attestation void. I apprehend the delivery and execution were only voidable.

Wife's authority to execute Powers.

The wife may execute powers as trustee without the assistance of her husband. If authority, e. g. ^{sub. grants} given her to convey lands, vests the power in her. When she please, she may convey it to her husband or any one else. Where she is a mere trustee & has no interest, the husband's rights cannot be affected by her acts.

Where lands are vested in the wife to be conveyed on condition, she may convey them. This has been ^{in 10 cases} ^{reps 155} ^{See p. 107} disputed. The reason given by Baileys why this may be done is, that no right of the husband is affected. But were his consent necessary, his refusal might cause an injury to others.

It makes no difference, whether the power is vested in her before or after marriage. ^{See 10 cases} It was at one time, that the wife could not convey herself, when the legal title was vested in her as trustee to convey on condition. In the case in 10, the wife was guardian, and the question was, whether a receipt by her for money received was good — & the Ct held that it was.

Baron and Greville

Effect of a conveyance of the wife's real property by the husband.

Such conveyances may be made, but they operate only as conveyances of the husband's estate in the land i.e. a life estate. The wife or her heirs may enter after the husband's death. And the rule would have been the same if the wife had joined, and if it was by fine &c. This deed should be pleaded as a conveyance for life.

If an estate is conveyed to the wife during coverture, she, or her heirs, may after the husband's death, waive the conveyance, or confirm it at their pleasure.

If the wife joins with the husband, in a conveyance of her real estate, she may after his death waive or affirm it. Such a conveyance is merely voidable.

Has the wife a right to the arrears of rent due, during the husband's life? She has. But on what principle? The husband had a right to the usufruct, and the emblements would have belonged to his executor. The reason is that the wife was joint owner of the rent with the husband, & therefore takes the arrears by survivorship.

But where the doctrine of survivorship is abolished, she could not take it. If the husband should make the land of his wife, in his own name, his exec^r would be entitled to the arrears on his death.

If a lease be made to a husband and wife, they rendering rent & the husband dies, and the wife at-

Effect of a conveyance of the wife's
real property by the husband.

Turns the case, debt his against her, and it is said ^{1401 381.}
he is liable for the arrears. This I apprehend to be ^{1402 26.}
posed to the principles of Maron & Ferne. If a feme sole
has a lease of land, (paying rent) & marries & rent accrues
during coverture, she is not liable for this. The husband
having the profits, is alone liable for rent; & so in the
principal case, should he be on the same ground.

It is said in ^{1401 31, 8} that if a lease is made
to husband and wife, and rent is in arrears, that
the action may be brought against both. But, con-
sidering, that the husband, should on principle be sued
alone.

^{1401 348}

The husband can never release a contract made
with the wife, which is to take effect after the de-
termination of the coverture. He has not nor can he
ever have any right in such a chose; and therefore
is entitled to no control over it.

Also the husband is entitled to the use of
an annuity of the wife, but he cannot release it; for
it is real property.

If an estate is conveyed to the wife on condi-
tion, & this condition she cannot fulfil, if the hus-
band does not fulfil it, the estate is gone. This is
where the condition is in the deed.

But if the condition is annexed by Law & the
wife cannot fulfil it, if the husband does not, --
the estate is not defeated. As if a feme sole being
tenant for life marries, and her husband attempts

^{802 132.}

Baron and Bence.

Cases where the husband must join the wife in an action
and where he may do it tho' not obliged.
to alien in fee, the wife's estate is not defeated by the
breach of the condition annexed by a law to a life
estate.

In this state such an act does not in any case
work a forfeiture. The grant is good for the life of the
grantor.

Baron and Bence

Cases where the husband must join the wife in an ac-
tion, and where he may join tho' not obliged.

I take the rule to be universal, that if on the
death of the husband, the cause of action would
survive to the wife, both must be joined in the suit.
As if the action be to recover the lands of the wife,
or on a contract made with the wife before coverture,
or for an injury done to her property before marriage,
or for an injury to her person before or after marriage,
the wife must be joined with her husband - for in all
these cases the action would survive to her.

If the husband should in these cases sue alone
and recover judgment and die, his exec^s would be enti-
tled to it. This would destroy the symmetry of the Law.

The Elementary writers say that the husband
may sue alone for the wife's choses due before cov-
erture. Bouvier denies this. The husband may sue a-
lone for choses due to the wife after marriage. This
preserves the principle entire. These are his. The ca-
ses cited to support the position of the Elementary
writers are of this sort. The case in Cox is cited for this

Paulst 21.
Mol 347.
Co Litt 539.
Holt 25.
Co Litt 419.
Ryle 34.
Holt 266.
Co L 501.

Co L 588.
Co Litt 90.

3 Lev 200.
Meyn 30.
2 Lev 104.
Vern 367.
5 Bth 28.
2 Cox 570.
2 Wms 284.

purpose. The words of the Chancellor in that case are "that whenever choses in action come to the wife before or during coverture, and the husband dies in the life of the wife without reducing them to possession, they go to the wife; with this distinction — that for the choses that come to the wife after the marriage, the husband may sue alone in his own name, & may disavow to the interest of the wife." This proves clearly that in those accruing before coverture, she must be joined. For he has here no election to consider them his own or to join the wife. He must be joined.

Where rent was in arrear before marriage the husband disclaimed & the distress was rescued. The husband sued alone, as well he might, for by stat 37 H 8 this rent was givens in him.

Why may not the wife bring an action in her own name for her choses? The principles of Baron & Feme would not be isolated, for when collected it would go to him, & if he died it would survive 30 H 627. To her. Elementary writers say that coverture of herself induces a disability to sue. This I deny. If it did the wife could not sue during the life of her husband. And if the wife sues alone, her coverture must be pleaded in abatement. But if coverture were a disability, a judgment recovered in her name would be erroneous, and might be avoided as such. But that cannot be done.

It is said to be absurd that the wife should sue, for that husband and wife are one. This however would prevent the husband from suing alone.

Baron and Ferne.

The true reason is that the wife is unable to respond any costs, if judgment should be rendered against her. And it is unreasonable that a man should be vexed with a suit by a person who is unable to pay costs. The procuring a bondsman would not enable her to sue, since no judgment & execution can issue against her, which would subject her to imprisonment alone.

According to some opinions of great weight a chose accruing to the wife during coverture will, if not collected survive to her. And yet it is agreed on all hands, that the husband may sue alone. But I take Comyn's opinion to be the correct one, that the wife has no such right.

When the cause of action does not survive to the wife, or the husband's death, he need not join her in the action. But there are cases of this sort, in which he may join her. This is true whenever her person or property is the material cause of action. Thus if a promise is made during coverture, to pay the wife for labor done by her, she may be joined, tho' the husband is not obliged to do so.

2 Verbo 190. So if a bond is given to the wife during coverture or if a trespass is committed on her lands and only the usufruct is injured the rule is the same. But if the freehold is injured by the trespass, the wife must be joined. For the action would survive to her.

It must become due, on a lease of the wife's and during coverture, the husband may sue alone.

2 Mod 135

1 Falk 114.

Co B. 77.

1 Hol 315.

247.

3 Lev 403.

1 Vern 82.

for it, for this rent belongs absolutely to him. The rule ^{Dulst. 21.}
is the same, if husband and wife lease lands belonging ^{Palmer 207.}
to the wife. ^{Be J. 208.}

If there is rent in arrear, before conversion this by statute belongs to the husband, of course he may sue alone. But in all these cases, the husband may join the wife.

To this rule however there is an exception ^{Be J. 205.}
The husband cannot join the wife in an action for ^{399. 442.}
special damage to him, by an injury to the wife's ^{301. 455.}
person. In all other cases where she is the meritorious ^{18th 200.}
cause of action, the wife may be joined in the action. ^{1 Rev. 140.}
This is the case where property is trussed before mar- ^{1 Ed 346.}
riage and converted afterwards.

If the husband & wife join in an action, in which it may be done, & the husband dies, after the judgment recovered, the judgment belongs solely to the wife, on the principle of joint tenancy. Does she own the judgment in those States in which the joint accrescence is abolished? This is an interesting question. Is she trustee of this judgment for her husband's execs. It may be contended that she can, at any rate be entitled to but half.

If the wife had no right, which did not result from her joint tenancy, I should be inclined to think that she would be a mere trustee, with no interest. But I conceive that the only object of joining the wife must have been to entitle her to

to the judgment if she survived the husband, and ought to be considered as a voluntary gift to her. It appears to me to stand on the same ground with a mortgage taken in the name of husband & wife, which it is settled will survive to her.

Barth. 257.
4 Mas 186.

A contract made with the wife - to enable the husband to join her in the action upon it must be executed.

If the promise is an implied one, the husband must sue alone. Tho' the wife is the meritorious cause, the promise is implied to the husband.

lit. 25
Barth.

It is said in the cases cited, that if an express promise is made to the wife to pay her for a certain cure, & the husband does not collect it, it survives to the wife. If so this is analogous to the modern decisions respecting legacies, given to the wife during coverture & not collected by the husband. There it is said will survive.

In *Liff* it is said that in such case the husband must join the wife in the action this however is incorrect, and is denied in the case cited from *Barth*.

3 Lev 63

There is a case in *Lev*, in which an action against husband & wife for detaining the plaintiff's servant, was sustained & judgment recovered against both.

Surely the wife could not be liable on account of a ~~retaining~~ contract, & if it was by ~~toit~~ it was committed by her in company with the husband.

band & so she could not be legally, be subjected.

Land was conveyed to J. S. & his wife, for life remainder to the heirs of J. S. in fee. Husband & wife made a lease of the premises, & the action was brought by the husband alone, for not repairing the house, & the test was it to be properly brought. This decision was doubtless correct; the reason given for it is in truth is not the true one. The wife in the case had no interest, since according to the rule in *Shelly's case* the ^{husband} ~~wife~~ took a fee.

Husband and wife cannot join in an action for the battery of both; the wife is not entitled to damages for the injury to her husband. For that she must sue alone.

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Where husband and wife must be joined,
when Defendants.

If the right of action would survive against the wife, on the death of the husband, she must be joined with him as deft. Thus she must be joined in all actions on contracts made by her during marriage — or for torts committed by her during coverture, out of the presence of the husband, or to recover land, of which husband and wife are in possession, in her right.

But if the husband during coverture, discover some person, in possession claiming in right of his wife, this is a tort for which he alone must answer.

If the wife alone (as out of the presence of her husband) commit a tort, she must be joined, with him, when sued.

Co. L. 387.
Vol. 280.

It is said, that if the wife enters with her husband and commit a trespass, this is her tort for which she is liable with him. The reason for this rule or rather exception, (if there is any), is that by this tortious act the wife acquires an estate.

If husband & wife are sued for a battery, and the husband be acquitted, but the wife found guilty, no judgment can be rendered against her. If the husband had been sued for the battery of them ~~both~~ wife, then if she were found guilty, judgment would go against both. - In this case it was said, that if husband & wife had sued for a battery to both, and judgment was found in favor of the wife alone, execution might issue. This decision I think correct.

Power of a feme covert to Devise at Common Law.

This subject has been fully considered under the title of Devises.

As marriage a revocation of the wife's will made while sole.

Marriage is laid down generally, to be a revocation of the will of a feme sole. This rule as laid down may be questioned. In most cases it does prevent the execution of the will, and so

Separate property of the wife.

no may be considered a revocation. But this will not always be true.

If the wife devises personal property, & marries, this property belongs to the husband, so that the will cannot operate.

If the will be of real property, marriage ^{2 Geo. 2.} is a revocation. So at the time of it's consummation, she is incapable of making a will. But I apprehend that marriage of itself is not a revocation. The party making the devise, must have the power of devising, both at the time of it's inception, and consummation - unless in cases where the deviser becomes non compos mentis after making his will - & even in this respect the rule is decidedly disapproved of.

If I have considered the true ground of marriage as a revocation of a will, it follows that, if a feme devise, her choses in action & marries, & the husband dies without collecting them, her devise will be good. For when she makes her devise during coverture, as also her separate property.

A submission to arbitration, by a feme sole is revoked by marriage; but the husband may concur. As then, he has the management of her concerns.

Separate Property of the wife.

There has been a reluctance in many cases of the State, to adopt in it's full extent the English doctrine regarding the separate property of the wife. But it must I think finally prevail.

Baron & Feme.

Separate property of the wife.

The English doctrine is, that the wife may have separate property, either personal or real, over which the husband has no control. This may be settled up on her, to her sole & separate use by the marriage articles, or it may be given to her afterwards.

5th 696.
Hunt. 189.
Dec 515.

Formerly such estates were given to Trustees to be use of the wife, who then had the sole control over it. But according to the precedents, the trustee had no right to maintain an action. This however has now decided otherwise in our Supreme Ct. Errors. The wife may do as she pleases with this property, unless she is bound to have the consent of the trustee. This is now settled.

18th 129.
28th 516.

In late years it has become usual (and the practice has been sanctioned) to give the property directly to the wife.

3rd 62.

No technical words are necessary, if the intention is apparent to give a separate property. There must however be some words manifesting this intention. The words "the wife's receipt is to be sufficient discharge of my exec^r" were held to be sufficient.

5 Dec. p. 557.

The gift of a legacy to be paid to the wife, without any other words, does not convey a separate property. But it has been held that the words sole & separate use were not necessary.

18th 126: 516.

Hunt. 189.
5th 699.

It has been doubted, whether there was any way to enforce the payment of any gift or grant direct to the wife for her sole and separate use. If there were trustees they might sue. It was

Separate property of the wife.

helden in the case cited from P.W. that there was no way for the wife to recover such a bequest. But it is now settled that the husband is trustee for the wife, a man with her bring the action, holding the money as when recovered for her sole & separate use.

Why cannot she herself sue? She may sometimes file a bill in Ch't. The reason why the wife must join the husband as prochein ami is, that she if defeated, would be unable to respond to the costs. Moul. 205.

The husband himself may give property to the wife for her separate use.

A gift of jewels on the wedding night, 5 M. 292. by the wife's father-in-law, has been holden to be her separate property, & not her paraphernalia. This from the circumstances, was thought to be the intention of the giver.

So a gift of trinkets by the husband, & a gift by a stranger, have been holden to be her separate property. But there must be something manifesting an intention to give them to the wife for her own, and not as her paraphernalia.

Where there have been articles of agreement, and then there is a gift of property, it is clearly her's 2 Dec 689
uncertain whether
very, or best. Moul. 205. Here the articles furnish evidence of the intention.

In one case the husband left his wife, with two small children, & went abroad without affording any support for them. The wife in his absence had acquired some property, which she loaned out, taking

Separate property of the wife.

Bonds for her security, after 4 years the husband returned, and took the bonds. On application by the wife, Ch^o decreed a restoration of the bonds, as her property. This is a case sui generis. It is certainly just, & the law is imperfect with the rigid rules of law.

For surely the wife cannot ordinarily acquire ^{separate} property by her industry.

Is the separate property liable of the wife liable for her contracts during cohabitation. There

seems to be no reason why it should not be. Even if the creditor can procure a decree in Equity, and get the property, it may be taken in fulfillment of her contract. But it will be very difficult to get at it. It is impossible at law to get at the

separate property of the wife, for execution issues against the body, & it cannot issue against the

14 Apr. 12. Many of the wife without her husband.

When the wife granted an annuity out of her separate property, for the benefit of her husband, & the trustee informed the husband that he should pay the money only to the wife, Ch^o supported the annuity. The wife complained that she was under the coercion of her husband, but the Ex^o proceeded on the ground, that there would be no coercion of her as wife in regard to her separate property. If she had the benefit of it she ought to be liable on her contracts, as others are.

Separate property of the wife.

If the wife advances her separate property ^{1st M. 269.}
to relieve her husband, in many cases she will be con- ^{2d W. 82. 241.}
sidered as a creditor & in others not.

If it appears that the wife meant in
this manner to aid in supporting the family, she
is not a creditor. But if husband & wife treated
each other as debtor & creditor in regard to this trans-
action, then on his death she will be considered as
a creditor. This the rule of distinction in all cases.

Where the husband & wife agree that the
separate property shall be paid to the husband, Chb
will enforce the agreement. So if the wife appear in ^{2d W. 341.}
Ch & request the trustees to pay the money to the
husband, the Ch will compel them to do it. —

Where the wife called in her separate personal
property, & put it out at interest in her husband's
name, & the husband died, it was holden that this
money belonged as a gift to the husband. I doubt ^{Set.}
whether such an intention was apparent on
her part.

Where money (the wife's separate property) ^{1st M. 289.}
the hands of trustees comes into possession of the ^{2d M. 343.}
husband with or without the consent of the wife ^{1st M. 209. 12.}
is by him laid out in purchase of land, this land
is not liable to the trust, unless that is expressed in
the deed, or unless the application of the purchase
money can be proved. But it was remarked by the
court that the same rule was applicable, to any trustee,
who purchased for a certain use trust.

Baron & Hume.

Separate property of the wife.

Baron proof may, notwithstanding the statute of frauds, be introduced to show, that the said belongs to the cestui que trust. There is also, no way of discovering the fraud.

2 Dec. 452 Whether the wife can dispose of her separate property, where there are trustees, without their joining is questionable. It is settled that she may dispose of her personal property. If the husband (where there are no trustees) will not join her wife she may join her prochein ami.

2 Dec. 452 When a wife who has separate property & no trustees is sued she must be sued in Chy & the wife by prochein ami may sue the husband, in Chy, where her separate property is concerned.

2 Dec. 452.
1 Ca. Ch. 25.
Hove v Hove
118/2.

When the wife sues the husband for her separate maintenance, she sues alone.

The wife in consequence of a quarrel between them left her husband, and went abroad. The husband in consideration of the marriage had conveyed property to raise an annuity for the separate use of the wife. The trustees brought an action against him and he prayed an injunction. It was proved that he had offered to live with his wife but for elopement alone, without any criminal conduct of the wife the Court refused to grant an injunction.

Settlements on wives by minors. —

The contracts of minors are not generally binding. But to this rule, there are exceptions. Contracts between husbands & wife before marriage, concerning a marriage settlement, have frequently been enforced in Ch^y, where the husband is a minor. 3 Atk. 607.

These decisions are made on the ground, that as infants are allowed ^{inter alia, the principal} to contract, i.e. the marriage, they ought of course to be bound by the accession.

Still however these contracts are not enforced as the contracts of adults. Ch^y of Ch^s will not enforce them, unless they are judicious. This rule applies to all contracts of minors, which they do not or cannot avoid.

It applies to minors who are executors, and also to partitions made by them.

These contracts are usually made with the consent & under the direction of parents & guardians — but this is not the ground, I apprehend of their being enforced. If they are not judicious & reasonable Ch^s will rescind them. So if the wife be a minor, and the settlement is entirely inadequate to the choses in action belonging to her.

An infant wife is barred of Dower by a jointure, in the same manner as an adult. In neither case is there any obligation, unless the settlement be a competent.

Baron and Feme Marriage settlements, before and after marriage.

2. 4th 1802

A contract entered into before marriage by the husband for making a settlement on his wife, or for settling her to whatever she may acquire during cohabitation is binding & will be enforced in equity.

Comp. 2. 4th.
2 M. Ch. 1802.
Ch. Ca. 1802.

These settlements will always be affected to the husband's doing and being equally beneficial to the wife. This is a presumed satisfaction. But the husband cannot, when he has contracted to do a particular thing, compel the wife to accept of another thing equally beneficial.

But if he does a thing equally beneficial, which the wife accepts and receives the benefit of, the court will not decree a performance of the original contract.

Settlements before marriage are not voluntary so as to be fraudulent against creditors either prior or subsequent. For marriage is a valuable consideration.

Any voluntary conveyance is not fraudulent against subsequent creditors, unless the grantor is indebted at the time of making it. But to make it fraudulent, it is not necessary that he should be a bankrupt or unable to pay his debts at the time of his conveyance.

But the marriage settlement must not be unreasonable or extravagant. If it is and the husband is indebted, the settlement is fraudulent as against the creditors.

Suppose I settle an estate to himself and his intended

her wife for their lives remainder to their issue, they will
be good as a marriage settlement. But if the son an- 2 H. 594.
d had been given to any other relation than his issue, 13. Ch. 554.
it would have been fraudulent in their hands against 1 Vent 192.
creditors; this in this case, it would have been good for the
wife of the husband's wife.

Where money is agreed by the marriage settle-
ment to be laid out in lands, & settled on the wife and her
issue, remainder to the heir of the wife & she dies without
issue, it goes to her heir. Suppose it is her land & settled on
her & her issue, with no farther limitation & she dies with-
out issue, it will go to her heir. Had it been
the husband's land, it would have gone to him, when
the entailment was spent. It is a maxim in Ch^y, that
what is agreed to be done, shall be considered as done; & there- 2 H. 217.
fore, money which is articulated to be laid out in lands & 2 Ven 20.
settled (ut supra) is not spent in the hands of the husband's
executors, but will go where the land would have gone,
as if it actually been purchased.

Settlements made after marriage in pursuance
of articles made before marriage, are as good
as if made before marriage. Ch^y will
decree a settlement after marriage in such case. 20.

Ch^y of Ch^y will consider a bond to settle a joint 2 Ch. 55.
use as an agreement to settle one, & decree a specific per- 1 Vern. 217.
formance. And if an agreement to settle is per the per- 2 Bo. 452.
formance they will decree the rest.

If the husband after marriage makes a
settlement, not not in pursuance of articles, this is

2. 185.
 Amb. 121.
 14.
 Ca. J. 185. 81.
 Dabb 4.
 Rep. Ch. 225.
 27.
 2 Atk. 447.
 10 Atk. 155.
 2 Atk. 225.

voluntary & fraudulent as against creditors, unless it is made in consideration of property received by her after coverture, or unless he is obliged to make the settlement in order to get the legal title from the trustees of the wife's property. But in these cases the settlement must not be unreasonable.

Settlements, in contemplation of separation for the wife's separate maintenance.

Such settlements discharge the husband from all debts contracted after separation by the wife.

But if she becomes a pauper, he must support her, if he is able. This is not true however, in cases, where she contracts with persons who know her situation, voluntarily trust her.

It is said that the husband is, on separation, so discharged from the contracts of the wife. It is said that this would make the wife a lame dove & so be entitled to property coming to her at or sometime separation. But this does not follow, unless the husband has by the articles renounced his right to such property. There is no case, which supports the doubt, whether the husband is not liable for the wife's contracts, after separation. 20.

If real property is settled by the husband on the wife for her separate maintenance, only the usufruct passes to her. She has not any power to alienate

so then she might spend the money and during the marriage. Rec. Cl. 185.
2d Ser. p. 427.

When the husband promises to leave the wife and
barn run, in consideration that she would sell her lands, 2 Lev. 143.
he was held to be bound by this executory contract. But
if in pursuance of his covenant he gives a bond to a
third person for her conduct, he is bound by it & it is not
frustrated against creditors.

It was formerly questioned whether a dona-
tio causa mortis to the wife was good - but it is now 22 H. 11.
settled to be good, & in the nature of a legacy.

A woman is not allowed to disclaim her hus-
band, by making a settlement before marriage without Mar. 17.
his knowledge. Such a settlement would be fraudulent
against them, but there are cases in which it has
been reasonable they have been held good.

When a woman before marriage, with con-
sent of her husband conveyed all her property in trade 35 H. 68.
to trustees, to enable her to carry on the trade for her
separate use, it was held that this property would
not be taken for the husband's debts. If he knew of this
conveyance, his consent would have been unnecessary.

In 2 Br. 84 it is said by Buller C. that no case has 2 Br. 84.
established the principle that every conveyance before
marriage without the consent of the husband is fraudu-
lent as against him. It must be such a conveyance as
deceives him. The mere fact of the husband's ignorance
does not constitute a fraud. Such conveyances for valuable
consideration are never fraudulent.

Mortgages to & by husband & wife.

It there is a very common practice prevailing for the husband to take mortgages jointly in his own & even 882 name & that of his wife.

In Eng^d on the death of the husband, the premises will belong to the wife as the principles of joint tenancy.

But to whom would they belong in those parts of this country where there is no joint tenancy? In Eng^d if the husband dies first it is regarded in the light of a voluntary conveyance to the wife. But the question here is. Shall the wife be entitled to the money? I should conceive not unless it is to be considered as a gift to the wife.

Vol 575
2 Decr 67.

It is also usual for the wife to join her husband, in a mortgage of her lands, or in a conveyance by fine (or other way, in this country) Formerly it was thought that a covenant by husband & wife, to convey a fine was not binding on her. But such a covenant is now holden to be binding. It would not I suppose be so considered, were it not that as to this covenant, she is considered as a feme sole. For she only agrees to do, what (as a feme sole feoffee puri) she has a right to do, legally to perform.

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Suppose the wife mortgages her land for her husband, and he afterwards takes up more money, is the land to be encumbered with this also? It has been so decided. But it is certainly a hard case, & I doubt the propriety of the decision.

Mortgages to and by husband & wife.

If the wife mortgages her lands for her husband, ^{1 Vern. 287} ^{1 W. 247 248.} ^{2 Vern. 150.} ^{2 Br. Ct. 201.} she dies, she has a right to call on the exec^r, after the debts are paid to redeem the mortgage. Where it is apparent from the transaction, that it was intended that she should be a creditor, she is preferred to all volunteers.

The wife joined in a mortgage of her lands to raise money to purchase a commission in the army; ^{2 Vern. 589.} ^{1 W. 254. 248.} on the death of her husband, before the commission was purchased, she was holden to be a creditor for the money. In all such cases she must be paid before all volunteers, but after creditors.

A feme sole mortgages her estate & married. the mortgage assigned, & the husband agreed to pay the P. M. money; and died. This estate was holden not to be liable.

If the wife mortgages her estate to disen- ^{2 Atk. 384.} cumber the husband's, she stands in the place of the mortgagee, and is to be paid before other creditors. The heirs must pay up this mortgage before they can have the land.

A mortgage being personal property, the husband has the same power over the wife's mortgages, ^{2 Vern. 201.} ^{501.} in fee as over he chooses in action. A competent settler ^{2 Vern. 201.} ^{501.} on her () purchases such a mortgage.

But if the husband never reduces the mortgage into possession, his assignment of it will not bind the wife. ^{P. M.} The mortgage follows the debt, & as this returns back to the wife, her security (i.e. the mortgage) goes with it.

But if for a consideration, the husband assigns the debt, the mortgage also passes.

Baron & Femme

Settlement gained to the wife by marriage.

The husband's creditors may alien the wife's mortgage to pay their debts, & this is considered, as a distribution to the creditors.

A feme sole mortgagee marries; if the husband becomes bankrupt, the mortgage passes by operation of law to the assignees under the commission.

Settlement which the wife gains by the marriage.

Every person born in a country has a settlement somewhere. If no other place of settlement is acquired the place of one's birth is his settlement.

Burns, just
9/4/49.

If a woman marries she obtains a settlement where her husband is settled, & this without co-morancy. If her husband has no settlement, tho' she gains none by the marriage, still she does not lose her old one.

She cannot however during coverture be sent back to her maiden settlement. For husband & wife cannot be separated. As therefore she cannot be removed to her settlement she must remain with him.

It has been a question whether if the husband has absconded, & has not been heard of, the wife may be removed to her old settlement. And it was decided that she may, as well as after his death. This follows from the principle on which the law is founded relating to this subject, *supra*.

Amilnepes for or against each other.

Previous to the stat 20 Geo 2, a marriage not celebrated as the law directs was always holden to be sufficient to give the wife a settlement. May that stat such marriages are now made void in Eng^d to all intents & purposes. But as the stat has not been adopted in this country, the old rule still remains here.

The Ct in Eng^d have admitted long cohabitation under the name of husband and wife as evidence of a marriage in accordance with the stat.

In Dougl. it has been the received opinion that a woman who marries a man, having no settlement gains one by long residence. I know of no decision on the point. Appellatives similarly situated do not gain a settlement under our stat by residence.

Husband and wife cannot be witnesses for or against each other. *Settled Evidence.*

12th 678.

The principle on which this rule is founded is the preservation of domestic tranquillity. The wife certainly can have no interest in her husband's suits which would exclude her. Persons who are excluded by interest may testify if the adverse party consents to their admission. But a wife in such case would still be excluded. The husband is not admitted in questions regarding the separate property of the wife. - yet he has no interest.

The wife cannot be permitted to testify for her issue, even tho' the husband be dead. For the rights of her children would be affected by it. *Barb. 77.*

Husband & Wife.

As witnesses for or against each other.

Is the general rule that husband & wife can not testify for or against each other there are exceptions.

It is said that in case of treason by the husband, the wife may be admitted to testify against him.

Also the wife on a civil claim by her against the husband to compel him to violence offered to her, to find murder for good behaviour is a proper witness.

But it is

stated.

And I apprehend that it is now settled, that the wife, on a civil claim against the husband, for an offence of the public for abuse to her may testify against him. These are exceptions from necessity.

1874

In last of these there is an opinion of the Chancellor opposed to this, but it was not a judicial decision.

In an indictment against the husband for a forcible marriage the wife may be a witness against him, for she is not his wife.

There is a case in 1000. 1001. which seems to support the doctrine - that the wife cannot testify, when the evidence may tend to criminate the husband to a very great length. This doctrine would prevent the wife from being a witness when the husband has been examined to prove a fact, at the happening of which both were present. For she may surely disclose & so criminate the husband. But I never look the law to be so, so.

Celebration of marriage.

All governments require that contracts to marry shall be celebrated in some way; otherwise no marital right can be acquired. Mar. 176.

Before the Reformation, when marriage came to be considered as a sacrament, the celebration has of course fallen into the hands of the priestly clergy. But at the Reformation, this doctrine that marriage was a sacrament, was exploded. To keep however the custom prevailed of having marriages celebrated by the clergy, that it still continues, until, during the protectorate of Cromwell, a stat. was enacted, taking from the clergy the power of marrying, & giving it solely to the justices of the peace.

After the Restoration of Chas's, the episcopal clergy were again authorised to marry, & in the 25th of Chas. an act was passed regulating marriage, which gives concurrent power to the justices & the clergy, and makes void all other marriages than such as are celebrated in accordance with its provisions.

This stat. has not been looked on in this country. But on this subject an important question has arisen on which a variety of opinions have been entertained.

The question is which shall decide whether a marriage that is not solemnized as the Rom. Law or Stat. in the States direct (when others are not expressly made void) is valid or not. If they are void the issue of all such marriages are bastardized. For example, if a clergyman in Rom. Law marries a couple

Baron & Berne

Celebration of Marriage.

out of the limits of the county in which he is ordained as the marriage is celebrated.

The law stands as that such marriages are as valid as any others; tho' the persons who celebrate them (whether ministers or laymen) incur the penalties which the law imposes.

Marriage is a mere civil contract, and was originally celebrated among the primitive Christians with no other solemnities than such as attended other contracts. The form was, in presence of three witnesses "Take this person for my husband & wife &c."

The clergy first assumed the power, over marriage in the time of pope Innocent III & continued to exercise it to the exclusion of others till it was given during the protectorate to the justices of the peace.

From that time until the restoration of Charles II it was unlawful for clergymen to marry. Yet so great was the partiality of the people to a custom, to which they had long habit had rendered them attached, that, within their period of prohibition, many marriages were solemnized by the clergy. The question then arose in numerous cases, whether such marriages were binding, so as to entitle the husband to a writ for a debt due to his wife before sentence, or the wife's widow after his death to a distributive share of his estate, or the public to a proceeding for bigamy in case of a subsequent marriage; & it was held in all these cases that they were.

Age at which marriage may be contracted.

The age at which marriage, which will be binding, may be contracted is in males 14 & in females 12.

Minors may marry at any time: but when 6 Co. 22. either of the parties attains the age, which the Law 7 Co. 42. prescribes, each has the power of dissenting to the marriage. But if neither does dissent, there is no need of a new celebration. Holab. 340 Co. L. 35.

I doubt whether our Ill. in Court would establish such marriages.

There has been a discrepancy of opinion on the question, whether a marriage obtained by Duress, is void. I can see no reason why this maxim, important of all contracts should not be made void by Duress, as well as those of minor concern.

It is now held in Eng^d to marry a woman of substance by force & Duress. 1 Hale 651. 1 St. Tr. 455.

It is said in some of the books that a marriage by an idiot is binding, & this seems as rational as that marriage by Duress is binding. But it is now settled otherwise.

Lawful & unlawful marriages, & the consequences. Divorce and Alimony.

From the stat 22 Hen. 8th we are to learn who may marry. By this stat "no prohibition, Gods law or ecclesiastical decree shall approach any marriage without the Sec. vtiat degrees." Marriages then, within the Spiritual degrees are not good. This circumstance - in a former marriage

Lawful & unlawful marriages

riage - or corporal uncleanness, are the true causes, for which the Law will grant a Divorce a vinculo matrimonii, on the ground that they were not binding from the beginning.

Relations by affinity are as mixed within the Levitical degrees, as relations by consanguinity. The husband is related to all the blood relations of the wife & the wife to all the blood relations of the husband. The Levitical degrees comprehend all relations, in the ascending & descending line, & all within the third degree in the collateral - by the civil rule of computation.

1 Cor. 5:1.

It has been determined that a marriage by illegitimate persons within those degrees is not binding. This was decided in the Ecclesiastical Courts, & repugnant to the principles of the Rom. Law, by which a bastard is considered as filius nullius.

Marriage with the wife's sister was forbidden by this stat, the parties being within the third degree. Yet we find nothing in the Levitical Law which says any thing against marrying a wife's sister, unless in the life time of the first wife.

Polygamy was not at that time forbidden, except the marrying of such relation, by any of the sacred writers.

By stat in Count, liberty is given to a widower to marry as sister of his former wife. She is in the second degree of affinity. A question may arise

Divorce &c.

5 Bulst 257
1 Hol 578.

ing done to her, & her husband has no power to clear the costs, for there are no here of expenses paid out of her alimony.

Gl. Ca 24. 184
to L. 135.

The Ecclesiastical Ct in Eng. in granting divorces a mensa et thoro, often grant alimony to the wife. This she may sue her husband to recover.

Our system regarding Divorces is very different from the English. Here the subject of divorces is regulated by Stat.

By this stat one wherein it may grant divorces for fraudulent contract. Adultery. Three years wilful absence with total neglect of conjugal duties - absence unheeded of between years. But in the last case the party may marry again without a divorce.

The fraud which will warrant a divorce, is not confined to the fraud of concealing corporal impotency. Other frauds which would avoid another contract is sufficient. Just before the organization of the present Ct of Errors, a case of this description came before the Ct. At that time the Ct. held that no fraud would warrant a divorce except that of impotency, and that no other was intended by the stat. This decision was entirely in contrast to the practice of the Superior Ct, which I apprehended was correct. The Legislature could not have meant more unbecomingly by the term fraud in the Statute.

How 3
11290
to L. 20.

The "abolition" in our stat is meant any

Divorce &c.

illicit connection of a married person with another, whether married or single. This is the *Concubitus Adulterius* as distinguished from what is called Concubinage Adultery which can only be committed with a married woman.

The three years' wilful absence must be with an intention of the person to leave his or her family.

If the husband turn the wife out of doors & so ill uses her that she cannot live with him, she may after an absence of three years act a divorce.

The divorce granted by our Rts for those causes are a *vinculo matrimonii*. But by such a divorce in this State the children are not bastardized.

Where the wife is the innocent party the Rts may assign to her a part (not exceeding 1/3) of the husband's estate forever, & this does not bar her right to dower.

If the parties are within the Levitical degrees no divorce is necessary.

For any other than the causes just mentioned application must be made to the Legislature, as for example. They divorce either a *vinculo matrimonii* or a *mensa et thoro*, and they may allow alimony. But the creditors are not to be injured by this.

In Eng^d if there is a divorce a *vinculo matrimonii* i.e. for an original disability to marry the wife's shares belong to her. But if there have been assigned bona fide for a good consideration they can not

Baron & Feine

When a feme covert, or administratrix is married, of the hus^d rights not be taken from the opignion. Still however, the husband would be answerable for them to the wife.

In Eng^l after a divorce a vinculo matrimonii, no Dower is allowed; for there was no lawful marriage.

A wife divorced a mensa et thoro is not entitled to be administr^{tr} to her husband, or to have her share under the stat^{ut} of distributions. For she has had her dower.

L.

Office of exec^r
208-7.
C. 116.
5. 116. 277.
2. 116. 3. 116.

A husband who marries a feme executrix, or administratrix, acquires the same right to administer as tho' he was exec^r or admin^{str} in his own name.

If he administers he may bind her without her consent. But it is said in *Blountworth's exec^r* 200. That she may devise away property which she holds as exec^r or admin^{str} as will, it will go to her administrator.

C. 116. 600.
M. 116. 600.
2. 116. 118.
1. 116. 607.

If the feme before marriage commits a devast^{ure} with the husband is liable during coverture. But if both were guilty of a devast^{ure} during coverture, he is not liable after it's determination, unless judgment was before obtained against him.

If husband & wife sue in right of the wife as exec^r the judgment does not return to the husband but goes to the administr^{tr} de bonis non.

The precedents with regard to her power over the property are apprehend inconsistent.

Continued.

It is said by some that she may act with full grants
 the consent of her husband, while others maintain ^{St. St. 554.}
 that his consent is not necessary. It is said that ^{Office of exec}
 the wife cannot take upon herself the Adminis- ^{200. 297.} ^{1 Galh 200}
 tration of an estate without her husband's consent.
 But according to the more modern cases it would
 seem that she may administer without his consent.

Executors & Administrators

Chas. George Brown

When a man dies his estate is disposed of either by will, or when there is no will, in a particular method prescribed by Law.

I am to speak only of personal property. The real property vests at the death of the ancestor in the heir - both interest & possession and all actions are brought in his name.

The personal property vests in the exec^r. But he has over this more limited power, than what the heir has over the real property, he holds it only, as trustee for the creditors &c of the deceased.

The personal property is a fund to pay all debts. The real property is reserved to pay only particular ones. In less real property is not liable to discharge the simple contract debts, even tho' there be not sufficient personal property. It is therefore usual for the testator in that country where he knows there is not sufficient personal property to discharge his debts, to devise his real property for the payment of his debts, & then his real property is equally liable with his personal.

The Com. Law still remains in force in those states where express acts do not contradict it.

If there are simple contract & bond creditors. The bond creditors may go either to the real or personal property. If then they take their debts from the personal property and by this means there is a deficiency in the personal property to discharge the simple contract debts. The simple contract creditors may apply to Ch^r, & that Ch^r will permit them to go to the heir for the amt of the

land debts, which have been paid out of the personal property. This is called Marshalling Assets.

All debts are considered equal in Ch^o. And this is adopted in most of our States. There is however a preference in some of the States to some debts, as for example judgment debts are sometimes preferred to others.

No volunteer will receive any thing until all the debts are paid. "A man must be just before he is generous."

The Ch^o of Ch^o in this respect is the same manner as our Law Ch^o in this country. And when the assets are thus taken and equally distributed among the creditors they are called equitable assets.

In Eng^l if a man ^{devises} ~~devises~~ real property to be sold to pay his debts, the personal fund is first to be exhausted & then the real property taken to discharge the remaining debts. But in this country if a man devises that his real property shall first be taken, & then the personal. The reason of the Eng^l rule is doubtless legal.

vide
appeal-2

The executor has the legal title over the personal property, & it is his first duty to pay the debts, then following the directions of the testator in his will. If there is no will an administrator is appointed, whose duties are the same except that he is to follow the directions of the Law, instead of those of the will in the distribution.

There is no priority between the different legacies. If all debts & legacies are paid, & there still remains a sum of money in the hands of the executor, without any direc-

tion in the will, how shall this be disposed of

Cts of Law hold that the exec^r shall retain this if no other person can claim it as residuary legatee. Before it is said he possesses only the legal interest, he now has also the beneficial interest. Cts of Ch^r act however as to this residuum the same as if there had been no will, they distribute it as if the testator had died intestate. They do this when a legacy has been left the exec^r. But if there has been more left him, they then follow the Cts of Law; and permit the exec^r to take it. A small legacy for a particular purpose will not deprive the exec^r of the residuum.

A specific legatee has no right to the legacy until all the debts are paid.

If a debtor is appointed exec^r, his debts are considered as appts in his hands, & he is liable not only to the creditors, but also to the legatees. But if both debts & legacies are paid, & this debt remains, it shall be considered as a residuum in his hands. No person can lay claim to it. I think however this would be a question if a large legacy were left him by the testator. If there is a residuary legatee, the exec^r cannot claim the property remaining in his ^{hands} after payment of debts & other legacies.

If a Legatee dies, the legacy sinks into the residuum. The testator is considered as dying intestate as to this property. -

Legacies

The executor is liable for the payment of debts to the extent of the assets he does not put the value of the estate at the death of the deceased, but for what it will produce. There are cases indeed (of devastavit) in which he is liable to the value of the estate.

The intention of the testator is the governing principle, when it is not contradictory to Law. If it opposes Law it is not to be regarded.

After payment of debts it is the first duty of the exec^r to discharge the legacies.

A Legacy is a gift by a deceased person by testament; it neither takes effect till the death of the testator.

2 Mac. 458.
Godolphin 271.

The person to whom the legacy is given is called the legatee. This term is commonly used when the property given is personal. If it is real the grantee is called the devisee; still the terms may be indifferently applied.

1 Vern 434. If the exec^r is a creditor, he must pay himself first & before other cred^{rs} of the same class. But if he is a legatee he must pay the other legacies before he discharges his own, that is to say he is always liable for them if there is sufficient property.

Co Litt 401.
2 Salk 598
Hoper 150.

The right of a legatee is an inchoate right.

Legacies are of two kinds — Pecuniary and Specific.

A pecuniary Legacy is where money is given, in these words "I give to my daughter £100 sd." But money

may be granted as a specific legacy. Thus should I grant
£100 from contained in a certain bag &c.

If there is a deficiency in the assets, the pecuniary legacies are always first liable for the payment of debts.

3, 4th 96.
1st 1st 60.
Appl. 25.
Appl. 31.
2d 1st 58.
1st 1st 22.
2d 1st 21.
More. 415.

If there are not assets — the pecuniary legacies exhausted, & part of the specific legacies taken to discharge the debts remaining unpaid — An important question has arisen whether the specific legatees who have thus lost their legacies can compel the others to who take theirs to bear their proportion of the loss? Thus the testator leaves a horse to A, two asses to B, & three sheep to C — the assets and all the pecuniary legacies are exhausted. The exec^r then takes A's horse, to discharge the remaining debt or debts — must A bear the whole loss, or can he be compelled to B & C to bear the loss with him. The question is still undecided, the authorities are various. ^{Heard the question the exec^r would have to answer generally}

Hopewell.

The specific legacies are sometimes to be first taken to discharge the debts. It may be expressly so directed by the testator. Or it may be inferred to be his intention.

Remains to consider for whom the assets are to be taken.
Appl. 11.
Appl. 122.
Appl. 123.
Appl. 124.
Appl. 125.

Legacies are vested or lapsed. A vested legacy is one vested within the legatee or his heir. A lapsed legacy is one that has failed thro' the death of the legatee, and it is immaterial, whether he dies before or after the death of the testator.

2d 1st 275.
1st 1st 200.

If there is a residuary legatee he shall take the remainder after the debts & other legacies are discharged. But if there is no such legatee, then goes the residuum to the exec^r, tho' he distributes it according to the stat^{ut}.

2d 1st 525.
Appl. 515.
Appl. 525.
Appl. 535.

himself.

The legatee has a right to demand his legacy within a year & a day. If he omits to demand it within this time the legacy lapses & falls into the residuum.

There is sometimes a proviso in the grant of ^{Rev. Ct. 470.} a legacy, that if the legatee die before a certain time ^{2 Vern. 209.} the death of the testator, that it shall go to another ^{do 521. 611.} person. The right of making this proviso has been disputed, tho' I believe it is now settled.

Conditional Legacies.

If there is an unreasonable condition annexed to a legacy — the non performance of it by the legatee shall not make a forfeiture of it. Thus a legacy ^{Proper 47} was left to certain persons provided they did not dis- ^{2 Vern. 91} pute the will. They did dispute it & tho' they failed in the suit, yet the legacies were not forfeited, for there was a probabilis causa for their objecting to the will.

Upon the same principle conditions restraining ^{Mod. 86.} marriage are void. ^{2 Bac. 479.} ^{1 Vern. 26.} ^{1 Bull. 209. 252.} ^{1 Str. 216.}

There was a case in which the condition annexed to the legacy was held good tho' made to restrain marriage. Thus — the father had a large family of children. He gave by will a large legacy to his wife provided she did not again marry. It was determined by the Ct that a breach of this condition forfeited the legacy. It was so determined said the judges from the peculiar circumstance of the case. Yet I can not but think that the decision in all such cases would be the same. ^{Vern. 20.} ^{2 Mod. 86.} ^{Godolphin 45. 6.}

There are restrictions upon marriage before a "reasonable age" which are good.

1 Kent. 142.
1 Ark. 502.
12 Cal. 565.
1 Phil. 241. 257.
3 Mac. 480.

Conditions against sound policy are void. Whenever the condition is held out in terror, it is void. Thus a condition that the legatee shall not marry without the consent of a particular person is void. All the above conditions were held out in terror.

The form of granting a legacy.

2 Vern. 469.
1 Gabelph. 287

There is no particular form of granting a legacy. No technical words are necessary. Any thing showing the intent of the testator is sufficient.

1 Vern. 108.
1 Vesey. 206.

A gift "to my children" when the grantor has only grand-children, will be a good gift to them.

Co. Litt. 212 d.
12 Cal. 470.
7 Dyer 157.

If a grant be made "to a man's children" a question has arisen, whether this grant is confined to such children as were in life at the time the grant was made or to all the children he might have when the testator dies? The following distinction has been taken. If

2 Vern. 105.
405.

the grant is by the father, it will extend to all his children who are born after. If by a stranger, the grant will come to the benefit of those children only who were in life when the will was made. This distinction is founded in the duty of the parent, who is bound to support all his children. This duty does not extend to strangers.

This supposes only the word "children" is used. The grant may without doubt be made "by the father" to extend only to his children in life, when the will is made.

But the intention must be expressed.

If a grant be made to the children of A & B, their children take per capita equally. If the grant be made to the children of A & B having no children

If a grant be made to the children of A having children at the time the grant was made. But before the death of the testator all A's children are dead tho' he has grand children, Can they take by the will? I think they cannot — and it is now thus settled. If there had been no children at the time the grant was made, the grandchildren would have taken.

J. S. devises a library of books to A for life, & after his death remainder to the heirs of B. C was the heir of B, at the time the devise was made. C died before A & D then became B's heir. Shall D take as heir to B? This is a question of considerable nicety — it is one of intention — Is the word heir a descriptive person? I think he who is the heir of B at the death of the testator will take by the grant. 1 Vern 35.

If property is given to a man's relations, it will go by this despite to all the relations, who would take by the stat of distributions — and it will be distributed as the will directs. If there are no directions in the will, the property will be distributed according to the stat of distributions. h. Pl. 401.
Fallist. Co. 251
2 Vern 529
1 Vern 501.

A man may by will devise a power to another to distribute according to his discretion, and the power is not to be exercised. 2 Vern 431.
513.
the Pac. Leg.
6.55

It will not interfere with this power, unless the distribution is manifestly unreasonable or unjust.

A difficulty sometimes arises as to the property intended to be passed by the will. — Thus a man supposing himself at his death bed makes his will granting all his corn to A, — He recovers lives many years and at his death has no corn in possession. What effect has the will?

Again, a man makes a grant of his coach to A, and being sometime afterwards at length dies when no coach is to be found. What is the effect of the grant? The question is still undecided. The specifying where the subject is makes no difference.

These are questions entirely of intention — and many circumstances as the situation of the family &c will generally show this intention.

Ademption.

3 Bac. 407
470. 473.
1 Ho. 333
Loulph 205.
2 H. Bl. 607.
2 Vern. 681.
1 G. Ca. 307.
Hoper. 39.
1 Mod 375.
2 B. W. 324.
Ambl. 401.
2 Vesey 309.
or 312.

A legacy is said to be adeemed when any thing has happened subsequently to the ^{making of} will, which has destroyed or taken away the legacy from the legatee. Here too where the ademption depends upon the act of the testator — the intention is the principal thing to be sought after. Thus should I. T. give a horse by will to A & afterwards sell him from necessity. This sale would be no ademption of the legacy, for tho' the testator was compelled to sell the horse, yet he still wished to benefit the legatee. Alienation by the testator from which you cannot infer an intention to adeem, is no Ademption.

If a legacy is lost, it is not thereby ademed.

If a debt is given to the legatee, and it is collected by the testator with an intention of ademing the devise of it, it will be ademed. But if the debtor voluntarily pays the debt & a receipt is given for it. This receipt is no ademption of the legacy.

If a legacy is lost or destroyed by the act of God it is thereby ademed.

The value of the article granted, when it has been ademed by the testator (unless with the intention of ademption) is to be returned to the legatee by the exec.

There are cases in which the legacy may be ademed by some after act of the testator. As where a father gave his son £400 to build him a house when he married. This son married during his life, & he then gave him £200 to build him a house, this was considered an ademption of the legacy. Hargr. 5.
2d ed. 115.

Again a gentleman supposing himself on his death bed, gave a legacy of £200 to his son. He recovered and afterwards bought a commission for him in the army. The price of the commission was considered an ademption pro tanto of the legacy. 2d Ed. 263.

In both these cases the sums given were such as the father gave his son on his death bed, and were the proportions he could give while providing for all his children. Hargr. 5.
2d ed. 115.

It was formerly a principle in Ch^y that if the testator bequeathed to his creditor a legacy ^{as great or} greater than the debt — it should be given in satisfaction ^{pro tanto} of the debt. 1d. Ed. 171.
2d Ed. 227.
2d Ed. 200.
2d Ed. 240.
2d Ed. 220.

4. Ch. 194. tion of the debt, but in subsequent decisions, the excep-
 2 N. Wm 515.
 1 Vesey, 521. 252. tions which have been taken, have nearly overthrown
 the principle.

1st. It was holden that to constitute a satisfaction
 it must be ejusdem generis, otherwise both debt and
 legacy should be paid.

2nd. It was holden that if the legacy was not gen-
 3 Atk 90.
 2 Vesey 409. 521. eral as soon as the debt, it should not be consid-
 1 N. Ch. 250. ered a satisfaction of it, tho' as great or greater &
 ejusdem generis.

3rd. It was holden that if the clause "after paying
 1 N. Wm 113.
 1 Vesey 185 my just debts" &c. &c. was inserted in the
 will, the intention was clear that the legacy should
 not be taken as a satisfaction of that just debt.

4th. When the bequest was to an illegitimate child, the
 1 N. Ch. 129.
 2 N. Wm 245. 525. it made an exception to the general rule, and al-
 lowed both debt & legacy to be recovered.

And finally it has been determined that the legacy
 1 N. Ch. 295 shall not be considered satisfaction of the debt
 unless so expressed to be by the testator.

This is certainly reasonable for it leaves it at
 the option of the cred^r to choose whether he will
 take the legacy in satisfaction, or take his remedy
 for the debt.

These rules do not apply to cases where legacies
 2 Barn 111. 555. are left to make provision for a settler agreed
 to be made during the life of the testator.
 Such legacies if accepted are a satisfaction of the
 agreement. The legatee cannot claim both ~~provision~~
 provision & legacy.

Abating & Refunding Legacies

The exec is never obliged to pay a legacy, until he has security for refunding it, if there should be a deficiency of assets to pay debts after^d appearing.

If an exec should pay a legacy without taking security - and debts should after^d arise - could he compel the legatee to refund? If the exec did not know of the debt it is said that he can - Why should the exec in any case be compelled to pay the debts out of his own pocket? The legatee is not entitled to his legacy until the debts are paid. But it is said if the exec paid the money supposing there were assets, without taking a bond from the legatee the latter shall retain the money. It appears to me that the question is still open, tho' a recovery the current of authorities perhaps is opposed to a recovery by the exec.

Suppose that after the legacies have been paid debts are paid & the exec is then insolvent - it is agreed that the creditors can then compel a repayment from the legatee or any of them by a bill in Chancery, after attempting ineffectually to enforce their remedy against the exec. Suppose the exec is not insolvent may the creditor then recover of the legatee, as being in possession of the fund? It seems not.

It is a principle in equity that if the cred^r has enforced the repayment of a legacy from one of the legatees, that legatee may by a bill in Chancery compel

1 Hen. 558.
2 Hen. 205.

2 Hen. 205.
1 Bl. Co. 145.
2 Hen. 358.
2 Hen. 195.
Lord. 210.
3 Mac. 485

2 Hen. 195.
1 Hen. 94.
2 Hen. 205.
2 Hen. 255.

pel a contribution among the rest.

Suppose a residuary legatee mentioned in the will dies before the payment of the debts. It is contended by some that the legacy is lapsed not being given to him until the debts are paid. But this is not the construction of the Ct. It is now settled his representatives will take it.

It often happens that a debt barred by the stat. of limitations may be recovered of the exec^r tho' it could not of the testator. As if the will orders all the testator's debts to be paid. This is considered a waiver of the stat., which leaves a recovery tho' it does not extinguish the debt. This proves that the stat. does not as on the ground of a presumed payment. It gives a privilege to the debtor, which he may waive or avail himself of at pleasure.

Suppose where there is no such order in the will the exec^r pay a debt barred by the stat. of limitations, will he be answerable to the residuary legatee?

On this question there have been different opinions. In point of Equity this was a debt which ought to have been paid. Is there any evidence that the testator could not have paid? no. I think the exec^r has acted justly, & ought not to be obliged to account with the residuary legatee.

2 Vern. 234.

It has been decided that legacies given to the exec^r must abate all deficiencies of assets with the other legatees.

We have already seen that a creditor can compel the legatee to refund on a deficiency of assets. Can a legatee in a similar case, compel the other legatees, to make up the deficiency in his legacy? It seems to be settled that he can, tho' the exec^t has taken no bond, altho' he has got a remedy ag^t the exec^t. But a legatee cannot take his whole legacy from any one legatee; but can only claim an abatement, so as to have an equal proportion in the hands of each. In this respect he differs from a creditor, who can claim his whole debt from any one legatee. There is not stat. of limitations to bar a recovery of a legacy.

1 Bl. Co 135.
228.
2 Vent. 260
Mog. 112

3 Vern. 21. 284.
M. Ch. 225.
1 Vern. 155.

Payment of Legacies

It is very common in Eng^d for the exec^t to obtain a decree in Ch^y, or have directions from the Ct of Probate with regard to the paym^t of legacies of minors. I take tho' rule to be settled that the exec^t may in common cases safely pay legacies to the guardian of the minor except the father, for he gives no bond for the performance of his trust. But the exec^t may if he choose keep the legacy in his own hands as trustee for the infant, till he arrives at the age of twenty one.

1 Bl. Co 260
3 Mac. 285.

In a case in Eng^d where the exec^t had paid the legacy to the father of the minor, who afterwards went into partnerships with his father and failed, the cred^{ts} were permitted to recover the amt^t of the legacy from the exec^t.

14 Wm. 285.
1 Co. Ca 300.

2 Vern 559
267.

6 Clin. 908.
Mass 555
12 Mass 891.

A legacy to a married woman (not to her special use) must be paid to her husband. If the husband lives separate from her on articles of agreement, it makes no difference, unless he has renounced all right to her legacies. If such legacy is paid to the wife, the husband can compel a second payment to him. The rule is the same if the husband & wife are divorced a mensa et thoro.

Time of payment

Robt. 9.
2 Salk 415.
1 W. W. 596.
2 Ro 88.
2 Wemy. 353.
2 Salk 415.
2 Vern. 231.
262.
Robt. 58.
2 Salk 109.

If no time is appointed for the payment of legacies they are payable at the end of a year, which time is given to the exec^r for the collection of debts &c. If the legacy is not paid at the end of the year, after it is demanded, it is upon interest until payment.

Debts are immediately upon interest without demand.

2 Salk 415.
1 Vern. 230.
6 Cl. 101.
Lord 209.

To the rule regarding legacies not paid after the year there is an exception in the case of infants, their legacies draw interest, without any demand being made.

Salk 61⁵.
6 Cl. 11. 107.
Seph. 104.

2 Vern. 346.
1 Cl. 505.

It has been said that in case of adults, when no time is fixed for the payment of legacies, the rule above laid down is undoubtedly correct. That that when a time is fixed for payment & they are not paid, they draw interest, tho' no demand be made. That this distinction is not warranted by modern authorities.

There are cases in which interest will be payable on legacies, tho' they are payable at a future time, as

to a minor for whose maintenance no other provision is made by the testator—his parent, who was bound ^{1 Ex. Ca. 501.} to maintain him. But if the child had another competent provision, or if the legacy were given by a person under no obligation to support him, it will not draw interest, untill the legacy becomes due. ^{2 Atk. 529. 3 Atk. 107.}

Where a legacy was given to the testator's brother, who was an adult & at sea, whence he did not return untill six years after. Interest was claimed but not allowed by the Ct. For the legacy had not been demanded. Demand having been prevented by the misfortune of the legatee. ^{1 M. Ch. 187. 2 Atk. 415. 1 Vern. 262.}

If a legacy is payable from a fund yielding interest, the legatee will be entitled to interest, whether a minor or adult. So if it is charged upon land to be paid by the tenant. The legacy will draw interest. Otherwise if the land is to be used for the payment of the legacies. The intention when discoverable is the governing principle in all these cases. ^{1 Ex. Ca. 501.}

It has been said by some that whenever debts are paid—the legacies all meet in proportion to the amt of the assets—and that then a suit at Law can be maintained. This is not true. the legal title is still in the Exec^r & can be directed only by his agent. ^{1 Houd. 525. 53. 1 Vern. 90. 5 Co. 29. 4 Co. 18.}

It is said by some of the old writers, (contrary, I think to principle, tho' I do not know that it has been contradicted) that if the exec^r has assented to a legacy, there can be no limitation to this assent. ^{1 Co. 614. 2 Atk. 508.}

How are Legacies Recoverable.

Dyer. 151.
 Polm. 120.
 2 J. 279, 364.
 10 L. 15.
 1 How. 55.

The legal title to every legacy is in the exec^r, till the time arrives when it is to be paid. If the exec^r promises in writing to pay a legacy, it has been always recoverable in assumpsit, and this was once thought to be the only remedy. Applications are now usually made to Ch^c of Ct^y, to compel the exec^r to perform his duty as trustee & pay over the legacies. In Conn. we proceed by an action at Law in Ch^c Ct^y. Where there is a promise the action is assumpsit. The consideration is a sufficient one for the exec^r has the legacy. Don't suppose the exec^r promises in writing to pay a legacy, & at the time there are not assets to pay the debts. The consideration for this promise has failed, & no recovery can be had of the exec^r. If apprehensive had the exec^r actually paid the legacy, in such case, he could recover it back on the ground of mistake. If the exec^r however gives a bond to pay the legacy, he will be liable tho' there are not assets, for a consideration is implied by the seal.

Polm. 58.
 2 Vern. 31.

8 Mod 26
 2 J. 279.
 2 L. R. 937.

With respect to real property charged with the payment of Legacies the Law is somewhat different. If the devise of the land charged so takes the land — this acceptance is an implied promise to pay the legacy & can be enforced in Ch^c the Com-Law Ct^y.

Suppose the testator gives land to B, charged with the payment of a large legacy to C — B the devisee of the land refuses to accept it. What interest has C in the land? The question has been

been depending in Ch^o in Virginia. Now it is apparent that no man can be compelled to accept a trust. But Ch^o will not suffer a trust to fail for want of a trustee, when they can create one; here however they have no power to give away the land charged to any person. But they will order it to be sold as much land as will pay this legacy, and the residue will go where the land would have gone, had it not have been devised.

Remainder after a life estate in personal property.

It is settled that a remainder may be created by will after a life estate in personal property, that ^{10 W. 21. 657.} is such kind of personal property as not being ^{39 W. 574.} ~~lost~~ ^{2d 81.} no person are susceptible of such limitation.

The first taker is not accountable for the property, if in using, it ceases to exist. The first taker must make out an inventory & give security &c. &c. ^{30 W. 954.}

Donatio causa mortis.

This is a gift by the testator on his death bed to take effect if the donor dies, but to revert to him should he recover. This is not inserted in the inventory.

The donor cannot give such a title to his property as to defeat the cred^s of their claims. But how can they get at it? They may sue the ^{donee} ~~exec~~ as ^{donee} ~~exec~~ of his own wrong. The true exec^r is not liable as the property is not inventoried.

It has been a question whether a chose in action could be the subject of a donatio causa mortis? The only difficulty as to it now is ~~that~~ a technical one. The ^{donee} ~~donee~~ cannot sue on the bond or in ^{his}

2 Ver. 451.
3 B.W. 350.

his own name, & no one can sue in the name of the original obligee; but his representatives after his death. Of the exact assents there is no difficulty in recovering on the bond. But if he refuses the difficulty may be apprehended he surmounted by enabling the donee to use the exec's name on tendering him a sufficient indemnity. And I should suppose the Ct of Ch. would exercise this power.

Lands devised to pay debts.

3 B.W. 322.

When lands were devised to pay debts, and the personal fund was exhausted to pay them, the question arose whether the legatees should come upon the land in place of the creditors. The Eng. construction of a devise for payment of debts is that if the personal fund is sufficient, the lands shall not be sold. If the land could have been sold in the first instance for the payment of debts (as in Conn. &c.) there could be no dispute, but that the legatees would stand in the place of the creditors, who exhausted the personal fund. The Eng. Cts. allowed the legatees to come upon the land on the ground that such an intention was discoverable from the circumstances of the devise.

The executor's right to the residuum.

1 Vern. 473.
3 B.W. 4043

2 Atk. 4788.
228.

2 Atk. 226, 200.

2 Atk. 220, 200.

2 Vern. 473.

2 Atk. 473.

1 Wils. 1513.

1 Bro. 207, 228.

1 Atk. 240

We have formerly observed that in Eng. the executor is not entitled to the residuum, if a legacy is at the same time given him. But this Equity may be rebutted by parol testimony, which restores the legal construction. But parol testimony can never be introduced to defeat the legal construction of an instrument.

Provision is made in some of the states that the exec^{ts} shall be paid for his trouble. In those states he has no claim to the residuum. He stands in the place of an administrator.

Voluntary bonds.

If a voluntary bond is given by the testator to one of his children, it is considered as a legacy, and is postponed to simple contract debts, for this is not a debt. Yet after the debts are paid this takes priority of all other volunteers. To allow it to be considered as a debt would be to give effect to a fraudulent conveyance. This claim ought not to be rejected by commissioners except conditionally.

Stat. of Distributions.

As I before considered the last duty of an exec^{ts} I shall now consider the last duty of an adm^{ts}.

The distribution of the residuum after the payment. As the distribution of real property has been already considered, I shall confine myself to the distribution of personal property.

In considering this subject the stat. of Charles will be our principal guide. — This stat. provides that the personal property of the intestate shall be distributed, one third to the wife, and the other two thirds to the issue. If there are children they will take to the exclusion of all other relations. If there are no children one half of the estate goes to the wife, & the other half to the next of kin, and their representatives. And the next of kin will exclude all others who are remote, excepting 1844.53.

where there are legal representatives. There is no representation allowed beyond brother's & sister's children. Males are not preferred in this stat. to females. Nor children of the whole to those of the half blood.

1. Derry 85.158.
2. Atty. 215.
3. Burns 61.
265.

A posthumous child takes under this stat. equally with those born in the life time of the intestate.

The descending line however remote will exclude the ascending & collateral line.

In the descending line the children if they are all living take equally. If some of them are living, and others dead leaving children, these children stand in the place of their parents, & take what they would have taken respectively. If all the children are dead leaving issue — as A leaving 1 — B & C & D. These grand-children each take per capita an equal share with the others. If some of the parents are living & others dead, their children take per stirpes. But if all the parents are dead the children take per capita. So if some of the grand-children are dead & others living, the children of those who are dead take per stirpes ut supra. The rule then is that where all the claimants are in equal degree they take per capita. If not — per stirpes. In the descending line representation goes on in infinitum. But in the collateral line it extends only to the third degree & never beyond brother's and sister's children.

2 Derry 213.
1 Atty. 452.
1 B. W. 25-7.
594.
2 Burns 233.
158.
Br. Ch. 28.

If there is no issue — the widow takes one half & the other half goes to the next of kin, and their legal representatives. How are the next of kin to be ascertained. In the descending line there is

no difficulty. You count from the propinquities up, and each is one degree more remote than the other as you ascend.

On the collateral line the computation is by the civil law, which computation was established when our state were made. Begin with the intestate as propinquus, & count up to the common ancestor of the intestate & claimant, and down to the claimant himself, and the number of degrees passed through, will only be the degree of his kindred.

By the stat of Jac. the mother is degraded to an equality with the brothers & sisters.

The representatives in the collateral line take per stirpes & per capita, according to the rules which govern representation in the descending line.

It makes no difference whether the representatives are the whole or half blood.

There is no question but that a brother and grand-father are in the same degree, & that the decision which gave the preference to the brother, marked the symmetry of the Law on this subject. D'Hardenne settled the rule from an adherence to the maxim stare decisis.

Those who are nearer of kindred tho' of a more remote stock, will take in preference to the grand children of brothers & sisters.

It has been said that there was an incongruity in the decision which preferred nephews & nieces, (the brothers & sisters being dead) to the uncles & aunts who are in the same degree. But we should reflect that in that case, the mother was still living, who

as the stat of James was degraded to the rank of both-
ers & sisters, therefore she being considered as one of the
old stock still surviving, the descendants of the others
must according to the established rule take per stirpes.

2 Alth. 118.

1 Salk. 229.

2 Burr. 710

3 B. & W. 409.

The beneficial interest in the distributary share
vests instantly on the death of the ^{or intestate} testator, in the
person who is entitled to it, & on his death before
the distribution will go to his representatives, ev-
en to a child en ventre sa mere.

There has been a great dispute whether a lega-
cy left to the wife & cancelled by the husband in his
life time, belongs to her like her choses in action? It ap-
peared that it belongs to the representatives of
her husband, as does other property acquired by her
during coverture.

{ 4 Burr.
or
Warr. 349

If the mother & grandfather are living, to
whom does the estate belong? It's the mother alone.

2 B. & W. 344.

1 Alth. 458.

She is only degraded by the stat. of James to prevent
her entire preference to the brothers & sisters, & not
to place her on an equality with other relations
of the same degree.

Suppose the wife dies leaving choses in action
uncollected by the husband, the Stat. 22 Ch. seems to
have taken no notice of a case of this sort. On
the principles of Com. Law they go to the next of
kin. The 29 Ch. has given them to her husband as
admr to pay her debts, & if there is a surplus, the
stat. gives that to the husband without being li-
able to account. In those states where the Stat. 29
Ch. has not been adopted, it may become an impor-
tant question to whom this surplus shall be distrib.

utes. I apprehend however that in those states, the husband will be no more entitled to it than any stranger, he unless he also stands in relation of next of kin.

See this whole subject considered with reference to the rules of the several states under the title of Real Property.

Advancement

It may happen that some of those, who would be entitled to a share in the intestate's estate, have received advancement in the life time of the deceased. In these cases according to the Eng. rule the property thus received is brought into hotchpot and divided among them all. According to our rule, the money thus advanced is never brought into hotchpot, but the person who has received it ~~who~~ will have a share of the intestate's property proportionally less.

What is meant by an advancement? It is not a gift of a packet—money &c.—but a permanent provision made by the father for the child. If the provision was received from an uncle or from the mother the person receiving it will still be entitled to an equal distributary share with the rest.

It is a rule of the Eng. Law that money spent in the education of a child is no advancement. In Conn. the rule is different. The furnishing a child with a liberal education, if found charged on the books of the parent, is always considered as a provision for

Co. Litt. 176.
Dr. Ch. 170-8.
1. Wils. 425.
2. Dr. W. 434.
1. Cy. Ca. 249.
2. Mem. 638.
2. Dr. W. 44.
2. Wils. 435.
2. Bac. 430.

for life. The charge is considered as evidence of the parent's intention.

Diversity of our Law, & the English.

There is a difference in several respects between our law and the Eng. concerning the settlement of estates.

- 1st. The real property is always with us liable for all the debts of the deceased.

- 2^d. In Conn. real property is liable in the hands of the exec^r not of the heir, in whom the title rests. The Ct can give power of sale, it is then effects.

- 3^d. The effects are all equitable effects, and all debts are paid *pari passu*, with preference only to the debts contracted in a man's last illness. With respect to these there is a question in Conn. regarding the construction of our stat. The words of the stat. are general including sickness debts contracted at any time without any particular preference to the last sickness. But it is in my opinion the proper construction to allow preference to debts contracted in any sickness. Tho' the Cts of Probate here in this State, generally preferred last sickness debts. The Eng stat. refers only to last sickness debts.

- 4th. By our Law, the exec^r is always bound to give bonds for the faithful discharge of his trust. By the Eng. Law he is not bound unless insolvent or in danger of bankruptcy, &c.

- 5th. If the estate is found insolvent it must be so represented which stops all suits. Commissioners are appointed to allow, or reject the debts. The Ct then orders a sale of the property, and an average struck. If the

expect disputes a debt, which the commissioners have allowed, & is successful, another average is to be struck. And also if any estate has by accident, been left out of the inventory, the rule is the same.

But Law does not take away any lien which a cred^r may have procured by his diligence on the estate of his debtor. But the law creates no lien.

In case of a voluntary bond, the exec^r files a bill in Ch^r & calls in all the cred^rs who are concerned to contest the right of the voluntary obligee, who together with him try the right. Under our Law there may be some difficulty with respect to this subject. Suppose this bond is for so great a sum as to make the estate insolvent. What is to be done by the commissioners? If they reject the bond, it is gone altogether if they accept it, the estate will be insolvent. The true way for them is to admit it, & state that it is a voluntary bond, and then the Ct of Probate will order payment to the other creditors first.

Executors & Administrators' first duties considered

If a will is made and an exec^r appointed who refuses to serve, or none is appointed, the Ct of Probate will appoint an adm^r cum testamento annexo and the will is to be his rule as much as it is the rule of an exec^r in ordinary cases.

An adm^r can do nothing without having first taken out letters of admⁿ. But many things may be done by an exec^r. He may collect debts,

may commence an action & is liable to be sued, &c.
 2 Bl. 507. And he cannot plead that he has not obtained probate of the will after having acted as exec^r.

Wills were made very anciently. Tho' granting letters of admⁿ are comparatively of very modern date. In case of the death of a person intestate, the clergy took the estate as trustees to employ the property in pious uses. They being answerable only to God defrauded cred^r of their claims and applied the property to their own emolument. A stat. however was soon made giving cred^r a right to recover their debts out of the estate. And the stat. 51 Edw. 1 was soon enacted which required the bishops to appoint the next friends of the deceased. And by a subsequent stat. it was made their duty to appoint the widow or next of kin.

2 Bl. 504.

Co. Litt. 106.

1 H. W. 531.

3 Atk. 520.

3 Palk. 21.

The Abt of Probate always exercises a discretionary power under the stat. in giving admⁿ either to the widow or next of kin, or where several are entitled to whichever is thought proper. It is not necessary that admⁿ should be granted to one person only, several may be entitled.

Str. 552.

1 Mol. 908.

2 Bl. 504.

The descending line has always been preferred, when there is one in that capable of administering. There is no difference between males & females, nor between the whole & half blood.

P. 4.
 2 Palk. 21.

When a female who is entitled marries she is excluded.

A minor cannot act as admⁿ till he arrives at the age of 21. In such case an admⁿ durante

durante minoritate is appointed. This latter person need not be selected from the next of kin. s B 29.
Holt 1551.

An adm^r cannot act it is said untill 21, because he cannot give a bond for faithful discharge &c. + But he may act as exec^r, because an. ex. bond. s. 3 Mod. 995
Caitt. 446.
 exec^r need not give bonds &c. If this is the true reason, in those states where the stat. requires a bond from the exec^r, it is said that an infant cannot act as exec^r. But I apprehend that where an inf^t has power to act in a particular capacity, he has power to enter into every contract incident to this principal trust.

If none of the relations of the deceased will accept of adm^r on the estate, the Ct should appoint a cred^r of the deceased, & on failure of them any discreet person.

If the exec^r dies before completing the adm^r, his exec^r if he has one will be exec^r Holt 907.
 de bonis non of the first estate. If there is no exec^r and adm^r de bonis non is appointed.

Duty of Executors & Administrators

An adm^r must always give bonds for faithful performance. An exec^r does not unless under special circumstances. It is otherwise under our stat.

The adm^r de must always make an inventory of all the estate of the deceased, & exhibit it at a certain time to the Ct of probate, and then administer the estate according to said. He must make a true acct of all his administration charges.

All the personal estate which comes into his hands is assets, & he is liable to the extent of assets to the extent of the net proceeds of the property inventoried. The object of the inventory is to make it appear to the Ct. what the property inventoried was which came to the hands of the adm^r.

If by any negligence or misconduct of the exec^r or adm^r there is a deficiency of assets, he is still liable in that capacity only to the extent of them. But he may be answerable de bonis propriis for a devastant.

Can an action be maintained on the bond of the adm^r by a creditor for his debt? No. Brings an action for the debt ag^t him. If he has assets he will then be liable. If there are no assets and the deficiency is owing to a devastant, sue him for a devastant. ¹Salh. 510. If he is able to respond there is no need of resorting to the bond. But if he is insolvent, sue on the bond. It cannot appear that the bond is forfeited, till a return of nulla bona inventa.

A power is invested in Cts of Probate to repeal letters of adm^r for proper causes, as if it appear afterwards^d that there was a will & an ex^{ec} appointed. But they cannot repeal without any cause. Should they attempt it, prohibition might be obtained from the Supr. Ct. Licence is always a sufficient cause for a repeal. But mere intemperance unless it induces a degree of insanity will not warrant one.

²Salh. 22
Lovel. 19.

Right of exec^r & adm^r to sue, & liability to be sued.

335

The exec^r & adm^r of the deceased become entitled to a right of recovery, in most cases, where the deceased was entitled, & become liable in like manner to be sued when he was liable. But there are cases in which the exec^r or adm^r is neither entitled to a recovery, nor liable to be sued.

2 Mac. 239, 445.
1 Deak. 26.
Camp. 372.
5 M. 549.
4 Mod. 403.
1 Salb. 314.
Ed. Ma. 94, 1502.
2 Phil. 193.
9 Co. 84.
1 Lev. 14, 29.

It is a maxim of Law that *actio personalis moritur cum persona*. The operation of this maxim is very much limited in modern times.

The exec^r can generally sue on all contracts. But he can he maintain an action for torts committed against the testator? Formerly he could not in any case. By an old stat. de bonis apporatis — the tortfeasor became liable to the exec^r for taking away timber trees from the land of the testator. But by an equitable construction, the stat. was extended to the taking away any goods. This is an ancient stat. & it is in force in this country. It is laid down as a rule that where the party has been injured immediately by the tortious act, the exec^r is entitled to an action. But for beating the deceased or for slandering him, tho' a consequential loss of property may have been sustained, the exec^r can sustain no action. So it was decided in Conn. that an action for malicious prosecution, does not survive to the executor.

By a late Eng stat, which has been copied in most of our States, it is provided that if the testator has commenced an action, which could have

H. W. M.

survived to the exec^r, the exec^r may enter on the death of the testator, & proceed with it, without bringing a new action. So if the testator is de^d, the pl^{ff} may proceed ag^t the exec^r or adm^r on giving notice to them to come & defend.

The exec^r or adm^r is liable to be sued for all contracts entered into by the testator with an exception which will be hereafter noticed. And for all torts committed by the testator, by which the agents have been benefited.

The exec^r is not then ~~the~~ answerable in a mere personal injury committed by the testator on the body of a third person. Nor for any malicious injury to the property of another, by which the testator's property was not benefited. Originally the exec^r was not liable at all, not even on the contracts of the testator, — and the remedy has not yet been extended to all cases of injury to which on principle it ought. It will be seen that there is not an entire reciprocity in regard to the exec^r's right to sue and liability to be sued. If the testator's property has been destroyed, the exec^r has a right of action. But if the testator has destroyed the property of another the exec^r is not liable.

Hamilton vs
Cooper. Suppose the testator took in his life some the property of another, what ~~latter~~ remedy has the latter ag^t the exec^r? Can you bring trover ag^t him? Latel 158. She was not guilty of treason. She would then be obliged to plead that the testator was not guilty of treason. But it is a maxim of Law, that the guilt or innocence of a man is not to be tried after his death.

This subject is well discussed in the case in *Cumfer*.
The Ct there sustained an action on the case ag^t the exec^r
stating all the circumstances of the case and ending with
"an. lapsumpsit."

The right of the exec^r may extend to contracts
respecting real property. If they are broken, he has a claim
for damages, which belong to the personal fund. So
on the covenants of seisin, the exec^r has a right of ac-
tion for a breach.

The exec^r may sue for rent in arrear, but for
growing rents on a lease after the testator's death, the
exec^r has no right to sue. The rent belongs to the heir,
to whom the land descends, on the testator's death.
The reason why the exec^r may recover for rent in
arrear is, that if collected in the life time of the tes-
tor, it would have belonged to the personal fund.
So which damages accrued on breach of contract.

There is an exception to the general rule that the
exec^r is liable on the contracts of the deceased. The
rule of discrimination is this. Whenever the consid-
eration of the contract moves from the person con-
tracting with the testator, the exec^r is liable on his
contracts, but when the consideration arises from
the performance of the act itself, for non performance
of which damages are claimed, the exec^r is not liable.
As for the failure of a sheriff to collect debts, who receives
his fee from the person of whom he collects debts.

The stat. W^m & Mary giving the exec^r a right to en-
ter. And also giving the off^r in an action ag^t the testator

a right to call in the exec^r by a *scire facias*, is a singular stat. Suppose in the last case, the plff does not wish to call in the exec^r, but is willing to discontinue his cause, can the exec^r have a right to enter as dft to save the costs? The stat makes no provision for a case of this sort, & yet there are many cases in which it would be reasonable, that the exec^r should be permitted to enter. It is strange that this defect in the stat has never been remedied.

The exec^r & adm^r are trustees for those, who are entitled to the personal estate of the deceased. Hence arises the introduction of Chancery into the matter.

Effects may be either real or personal. Lands are effects in the hands of the heir.

Effects may also be legal or equitable. Legal effects are such as come to the exec^r or adm^r in the course of the administration. Equitable effects are those to obtain which the interposition of a Ct of Eq. is or may be necessary. As in case of land devised to pay debts.

If one dies leaving lands not mentioned in the will, and which of course go to the heir, and has devised away others in his will, the lands descending to the heir are liable for debts before those devised away.

If the deviser charges the heir with the payment of debts and he refuses, Chancery will compell a sale of the lands. But if such creditors resort to the personal fund, those who would have been entitled to the remainder of the personal property, if the other debts had been paid by the heir, have a demand on him for their amount.

340. 1st. Co. 22. he had not assets enough to pay debts, his agent would
2 Co. 24.
Co. 24. 140. not bind him.

2 Pac. 354.

Sta. 318.

An inf. execut. under such must like other right
appear by qualification.

2 Pac. 378.

1 Paup. 235.

Auth. 119.

Cent. 400.

On the subject of a feme covert's being executor there is
much confusion in the books. A feme covert may be
an executrix & act as such. But the spiritual Ct. insist
so that she could be executrix whether the husband
wished it or not. This was denied in the Com Law Ct.
& the wife gave a prohibition. if the spiritual Ct.
should enforce her proceedings without the consent of
her husband.

2 Pac. 378.

Should the husband consent the wife's agent is
also necessary she cannot be compelled to be exec.

Suppose the husband has administered, when there
is no evidence of the wife's assenting, & there is no
evidence of dissent on her part, his adm't is valid.
So if the wife should act when his dissent is
not proved her acts will be valid.

1 Holl. 912

8 Do. 680

2 And. 92

1 Mod. 211

1 Holl. 608.

Suppose a feme sole execut. marries before ad-
ministering the estate. If the husband administers
in such case without her dissent, her agent is
implied.

Can a feme covert execut. create an execut. to ad-
minister the estate after her death? Yes.

2 Pac. 378.

Corporations cannot be executors. An execut. must
take an oath, which a corporation cannot do.
Do Coke give this reason? "because having no
soul they cannot be excommunicated for their default."
Excommunicated persons in Eng. could not be execs.

An Alien Friend may be an exec^r or adm^r as well as any other person. They may hold personal prop^{ty} ^{Co. Lk. 8.} ^{1 Cong. 205.} only & they act as exec^{ts} in the right of another.

Can an alien enemy maintain actions as exec^r? On this subject there has been a dispute. That he can hold effects is not to be denied. But whether he can draw property from the country has been doubted. Debts due from subjects of one belligerent power to the citizen of another are not extinguished on the declaration of War. The right of recovering merely is suspended, and therefore interest stops. I presume an alien enemy might recover and pay over to cred^{ts} in the same Kingdom. { 5 D. R. 23. - Mod 150. - 8 D. R. 163. - Doug. 649. }
{ 1 East 502 - 1 W. 163. - C. 1. 142 - 684. }

11 Min. Ab. 123. -
Co. Lk. 128-129. ?
note 244
3 Bac 62
C. R. 8. 9.
2 Bac 375
C. R. 242.
872a. 3
1 Mod. 431.
Chen. 376.
1 Balth. 36.
1 Bac 44.
1 Balth. 46.
C. R. 584.
10 Phil. 69.
Cullen 191. 29.
Moore 431.
2 Times 370
Ld. Ray 282
3 Bac —.

Idiots & Lunatics cannot be exec^{ts}. But a man is not to be excluded merely because he is a bad man. Ch^r however will compell such persons to give bonds for faithful performance, & also if they are poor & insolvent.

14 W. 25
Ld. Ray 561.
Balth. 257.
2 Bac. 235.
2 Vern. 225.
Ld. Ray 361.

Who may be an Administrator.

No one can act as adm^r until aged 21.

2 Mod 297.
Benth. 57.
Balth. 440

Crimes do not disqualify a person from being either an exec^r or adm^r. Coverture is no disqualification. But joint tenancy are generally postponed to others in equal degree.

1 Cong. 201.
242

The husband is liable for the debts & wrongs of his wife during coverture. But his liability ceases with the coverture. In a devastant committed by a feme covert before marriage the husband is liable during coverture, and after coverture in some cases.

2 Hen. 118. 61
 1 Ed. 309.
 1 R. 2. 51.
 1 R. 3. 54.
 1 R. 2. 455.
 1 R. 3. 200.
 1 R. 2. 205.
 227.

as where the devastant committed by the wife before marriage was an embezzlement of property, which she brought to her husband. In such case the creditor has a right to pursue the assets wherever he can find them. So where both husband & wife are dead, and the property embezzled by her has gone to his exec^r the latter is liable.

May Legates & next of kin pursue these assets in the same manner? I think they may.

Exec^{rs} were known to the dom. Law. Adm^{rs} are created by stat. If the deceased left no will, the wife was entitled to her rationabilis pars, and the clergy took the rest to devote to pious uses. This authority of the clergy being assumed the st. 28 Hen. 13th was enacted, which enacted and to enforce the payment of their debts. Alter^{ed} by stat. 31 Edw. 3 it was enacted that in case of intestacy, the ordinary should asse^{ss} the ^{goods} ~~estate~~ of the deceased to administer the estate. By this stat adm^{rs} were created. As the clergy held not before distrib-
 uted the residue after payment of debts, these adm^{rs} de-
 termined to retain it to themselves. This conduct gave
 rise to the stat. of R. 2^d relative to the distribution
 of intestate's estate.

1 Hen. 257
 9 Co. 39
 2 R. 2. 114
 4 Co. 51.
 1 Don. 4.
 1 Don. 215.
 1 R. 2. 557.
 1 R. 2.

The construction given to next & next lawful friend used in the stat, was that the next of kin was always intended, unless there was a trust of the deceased. A subsequent stat requires that the ordinary should give adm^{rs} to the widow or next of kin. The compilation is by the civil law. There is always discretion in the ordinary.

to appoint whom he will, of those who stand in equal
degrees.

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By the law stat. 17 Charles the husband is entitled to the
succession after payment of debts, without liability of ac-
count. Other adm^rs are bound to account with the next of kin. ^{2 R. 498.}
at this. We have no such stat. here so that the husband ^{3d R. 525.}
must distribute to the residue. If the husband should ^{11. W. 381.}
refuse to administer under the Ex^r st. the adm^r must
act with him.

The Ct have power to grant the adm^r of different ^{Level 4.}
part articles of property to different persons. But general ^{3d R. 432.}
adm^rs are joined.

Females are equal, well entitled with males, ^{Level 10.}
tho they may not be generally so well qualified.

There is no right of representation in regard to ^{2 R. 498.}
the rights of adm^r, next of kind is the language of the st. ^{3d R. 414.}

If the next of kin do not choose to administer, ^{2d R. 281.}
any exec^r is usually appointed, being a suitable person. ^{Level 5.}
^{3d R. 58.}

When the exec^r refuses the residuary legatee is usually ^{Level 556, 555.}
appointed; and it is a question whether the ordinary can
appoint any other.

A man cannot be compelled to be an exec^r. ^{2 R. 281.}

If the exec^r dies before the estate is administered, his
exec^r is the exec^r of the first testator. But if an adm^r ^{Level 6.}
dies before adm^r is completed, an adm^r de bonis non ^{shall go.}
is appointed. ^{11. Ch. 17.}

If one of two exec^rs dies having an exec^r, that last
has nothing to do with the estate, the whole survives
to the surviving exec^r and on his death, his exec^r
alone shall administer.

If two are appointed, each and one refuses, still he may, afterw^d claim to be exec^r by the Eng^l Law, it is otherwise in Bonat. The Ex^r who requires also those actions should be brought in the name of both, and that he who requires shall be summoned and
It is otherwise with us.

Administration is always granted in writing. It cannot be created by parol.

In all cases the ordinary or Ct of Probate must take 2 Mac 416.
2 Baw. 249.
or 2 Com
1 Comp 263. sufficient bond. Administration is often granted to two jointly. It is considered as in the nature of an office & survives on the death of one.

Admⁿ is sometimes granted pendente lito, when the validity of a will is disputed. So when the exec^r refuses to administer, or dies before probate, or after having partly administered, admⁿ is granted cum testamento annexo.

Suppose before the death of the exec^r, he had recovered judgment, & execution ag^t one of the debtors of the deceased. Did this judgment pass to the admⁿ, or did it belong to the representatives of the first exec^r? This was formerly a question. In Am. Law, principles doubtless the judgment belonged to the representatives of the first exec^r. They stat. in Eng the second admⁿ is entitled to a scire facias on the judgment ag^t the *debtor & thus avail himself of the original execution. Where the Eng. stat is not adopted in our country, the Com. Law rule must prevail.

If the original exec^r had taken a note of hand to himself, this would not pass to the admⁿ so long as he is alive. The representative of the first must account.

*creditors in the notes from which that was copied

2 Mac. 389.

6 Mac 290.

122. Ma. 1072.

Whenever the property can be identified it will pass to the second adm^r de bonis mor.
 1 alk 308
 2 Mac. 286

If the exec^t has not arrived at the age of 14 an adm^r de minore etate is to be appointed. If an inf^t and an adult are appointed, the adult can transact the business for both. Local. 192

Executor de son tort.

Where a person without any authority does such acts as belong to the exec^r or adm^r and apparently claims the power over the estate, he is an exec^r of his own wrong. But if it is clear that he has merely done a neighbourly act, without any appearance of claim, this does not constitute him an exec^r de son tort.
 1 alk. 307
 2 Mac. 286
 1 Burr. 281
 on Cas.
 Local. 51

Any person who receives property without

there must be an unlawful intermeddling with the goods of the deceased. Such as entering upon the property and taking possession. Collecting debts or paying them re. The payment of legacies, or taking a legacy left to himself, or pleading to a suit as exec^r will make one an exec^r de son tort.
 22 K. 100.
 1 Holt. 918.

So any person who receives property without authority from such intermeddling person will be equally treated as exec^r de son tort.

No deceased person can give away his property on his death bed, so as to defeat the claims of creditors. If he does, the donee may be treated as exec^r de son tort. As if there be a separatio causa mortis. A handwritten gift by the deceased is good op^t his exec^r.

346 2 D.H. 97. But not ag^t his creditors. In Conn. we have permitted the
ex^{ec} or admⁿ to sue such fraudulent donees for the pur-
pose of paying the debts of the deceased. They are con-
sidered as trustees for the cred^{rs}.

But acts which may be accounted for on other
suppositions than that of a claim of authority, do
not make one an ex^{ec} de son tort. As taking care
of the property - repairing in case of necessity, &c.

What acts are sufficient to make one an ex^{ec}
de son tort is a question of Law. The jus modo furnish-
es the rule of discrimination. This in the reported ca-
ses is often kept out of view, and hence they are
misunderstood.

The rules above apply only to those cases where
there is no ex^{ec} or admⁿ. If there is an ex^{ec} acting
the intermeddler will be a trespasser ag^t him and
will be liable only as such.

The ground upon which the cred^{rs} may sue the
ex^{ec} de son tort, is that when they see one acting as
ex^{ec}, they are not bound to enquire into his powers.

An ex^{ec} of his own wrong is only liable to the
extent of the assets he has received, he can sue nobody
himself, neither can he retain assets to pay his own
debts, like other ex^{ecs}. After the assets are exhaus-
ted he may plead plene administravit. But he is
still liable for the trespass to rightful ex^{ecs} or
adm^{ns} for nominal damages.

When a cred^r sues the intermeddler, he sues him as
an ex^{ec}, & he is estopped to deny that he is. But when
the ex^{ec} sues him, he is treated as a stranger.

There is no case in which an *exor de son* tort may make himself chargeable with the whole demand. As if he should plead that he never was *exor*, and it is found ag^t him. He should have demurred as to the amount he had received, and denied as to the rest. It has been said that the *exor de son tort* in that case could have relief in Equity - *tauer gosse*.

I do not think there can be an *exor de son tort* in *Common Law*, if the estate is insolvent. For it is a principle in such cases, that the *creditors* shall share alike, yet if *creditors* were allowed to sue an *exor de son tort*, one might obtain more than his share. There is no such thing as pleading *plea administravit*. The *exor* must pay the whole debt, or the average stroke, if there was a deficiency.

Exce^{pt} to Redm^{pt}

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Letters of administration may be repeated. They must be repeated when a will is subsequently discovered, or if they have been granted to one by mistake &c to one who is not next of kin, where the next of kin were not disqualified.

Where the admⁿ has been obtained by fraudulent suggestions &c. or where the admⁿ has become a nullity. Consequences of repeating letters of admⁿ.

The mode of repeating is this. The person interested appears before a Ct of Probate. And they issue a citation to the admⁿ to appear &c. If they find that admⁿ has been improperly granted the admⁿ is repeated. If the Ct of Probate disallow the objection, & affirm the admⁿ appeal lies to the Superior Ct.

A repeal in some cases renders every thing which has been done totally void. In other cases it has not this effect. If all that has been done is void debts must be paid once again to the rightful admⁿ. &c.

When the objection is that admⁿ was given to a wrong person, and it is repeated on citation all the intermediate acts of the first admⁿ are valid & binding in the same manner as if he had been the rightful admⁿ. But if such an admⁿ should give away the property, the cred^{rs} may sue the persons into whose hands the property has gone. If he had been a rightful admⁿ the remedy would have been of him. The rule is the same when admⁿ has been repeated for matter in part facta.

Whenever the admⁿ is repealed by citation because granted by incompetent authority, the whole of the proceedings under it are void. Where the will was forced an admⁿ granted under it, the acts done were held to be well done, for the Ct had jurisdiction tho' the will was forged.

But after a usual an citation it is said that the will tho' old acts done by the former admⁿ are binding was not held, where there was in reality a will left in the deceased. Because say, for, where there was a will the probate had no authority to ^{divest} ~~disrupt~~ the exercise of the power granted him by the will. Ct of Probate only have authority over those where the deceased died intestate. This has been the general view is common until lately. But I think the modern opinion by J. Buller will finally prevail, that the fact of a man's dying ^{not} intestate does not take a case out of the jurisdiction of the Ct of Probate, if the subject matter is within their jurisdiction. As long then as this appointment stands unrevoked, acts done by the admⁿ are binding.

A case a man left two wills, the former being revoked by the latter, which was not disavowed till after probate given of the first. On the subsequent repeal, were the acts done by the first exec^r void or binding? This question depends upon precisely the same principle as the last.

Suppose on citation the first judgment is affirmed and an ^{ad} upon the letters of admⁿ are repealed. What are the consequences of such a repeal? When

8 Nov. 1792.

1 Nov. 1794.

1 Dec. 1795.

22 Nov. 1796.

1 March 1797.

2 Dec. 1797.

1 Dec. 1798.

2 Dec. 1799.

2 Dec. 1800.

1 Dec. 1801.

2 Dec. 1802.

3 Dec. 1803.

4 Dec. 1804.

5 Dec. 1805.

There is a judgment in an executor, but it remains from that judgment is not an end; thence all right of the admin^r is set at naught. And his intention to set at naught the title of appeal and the judgment of appeal are void. Are all the acts which have been done in the admin^r made void by the return? There is a diversity of opinion on this question. But the authorities it seems to be settled that when the return is upon an appeal, acts which have been done by the admin^r are those of a trustee. What then is the consequence of this? Why that the admin^r shall be considered as a stranger, and only liable as exec^r of his own wrong, who may always defend himself by saying "I am domestic trustee to the executor of the assets which he has received. The right, but exec^r may have the assets as he may, but he will receive only nominal damages, if the first admin^r had paid debts with the money received.

5th Mar. 1880.
 5th Mar. 409.
 12th Mar. 426.
 2 June 129.
 10 June 41. 584.
 2 July 19.
 1 Nov. 419.
 1 Dec. 41. 21.

Altho' the above may appear harmless as one
deposited, and then says that the same
payment from the debtors who have paid the former
debt, can be recovered of them? Every thing is so
done by the former debtors is right, and that of
course ought to be paid to the same debtors as any other
debt. But therefore it has been held that the debt
is now to be paid to the same debtors as any other
debt. I am not satisfied with the decision, there are author-
ities on the other side, but the current of them
is in favor of the rule.

2 Dec. 27.
1 Holt. 219.
1 Camp. 224
1 sent. 244.
5 P. N. 130
1 Bac. 128.

Wills of Testate Property.

A will is the declaration of the testator's intention as to the disposition of his estate after his death. Wills must generally be in writing, & a will can only be made by a person who is of legal age & of sound mind at the time of making it as testament.

The presumption is that a person who has a will has capacity to make it. The law presumes that a man who is of legal age & of sound mind is capable of making a will.

Idiot - persons of non sane memory, and infants below the age of discretion are incapable of making a will. I have known the will of a person who was raving distracted confirmed because, the testator in regard to his property was rational.

The will must be valid to the testator, if he is incapable of making it. The wills of "non sane" persons have been established, when they have been proved to be of sufficient discretion, the owner's intention is in such case on the party claiming under the will. The will of a drunken person will be confirmed if he is rational in the disposition of his estate.

But kind of direct or indirect or teasing where the testator is on a sick bed is sufficient to set aside a will. But such will may be afterwards confirmed by the testator, if he recovers and does not choose to alter it.

In regard to age there seems to be a variety of opinions. By the civil law wills, infants could not make wills under the age of fourteen. But still lives the time according to the civil law.

been of personal value, and delivered up to the exec^r, it shall or shall not be void for the whole? Although in many cases, the intention of the testator, as far as it can be ascertained, by what he has said or done, is to be taken into account, yet in many cases, it is not.

At R. municipal debts must be paid. But the law is not so strict as to require the exec^r to pay them as far as possible. The law is that a request will be an order, except in certain cases, where the testator is an executor. This is a rule which has been established by the decision of our ancestors. Should municipalities wish to receive in their debt, where there is no statute? I trust that our law is more to the contrary has established a Com. Law of our own. The reasons for allowing municipalities to receive, has long since passed.

Other duties of exec^r & adm^r.

The exec^r must first make an inventory of the estate, for which they are accountable to the St of Probate.

The articles in the inventory are to be appraised, but if they should fall short of the appraised value, the exec^r is not liable for the whole. If the property exceeds the appraised value, the exec^r is not liable. The object of the appraisal is to as-

Stat. 12. 45.
25. 45.
3. 45. 46.

ertain the value of the property, if the legacies should choose to take it in lieu of their legacies. It is always prima facie evidence of the worth of the property.

When judgment is obtained against the exec^r in respect of the property, a judgment against the estate.

After the exec^r has made his inventory, he must collect the property & turn it into money.

"Person" is always a responsible man, and his name
 be considered for "a responsible character" for the Gov. The
 name, then, has the facts, the man, and, any probable
 loss, it is not reasonable to hold to suit specific
 legacies if he has other property sufficient. But he
 must always account for losses, and the Gov.
 cannot charge accounts to his name, unless the ap-
 pearance of showing the audit; then debts are to the
 King, or for his use, things of the deceased, debts
 of debts; Bonds, contracts, etc.; debts are simple
 contract, then, Legacies, etc.

26. 11. 202
Juli 1. 37.
2 Dec. 52.
54.
2 Mac. 438.

It seems there is no provision except in case of death due to the public funeral charges and last sickness death. Our rule is certainly more equitable than the Prop.

There is the average in. Ex. where the elements of equal degree, the apoth. sub. gas, which he pleases, only he cannot prefer a debilit. in presenti solven dum in futuro to an solvendum in presenti.

2 Bac 450
2 Kau. 57.
E. Clin. 315
0-1 F. M. 692.
Haw. 279.
Lof. 250.
2 Shaw. 492.
1 H. M. 412

If the eyes should say, a deed of inferior degree first, and then should prove a deficiency of a path, he cannot defend himself in an action by a deed of a higher rank, he becomes personally liable himself.

Sept 24 2
Local. 50.

creditor to pay some money for the payment of that
 debt, as the creditor must take the risk. It is cer-
 tainly a rule that credit must always be paid to
 the creditor and can never be taken out of the estate.
 In fact, there is no law requiring the creditor to ex-
 plicitly show the name of the estate in the contract.
 Hence, debts may show at any time. Since the creditor
 may always take the benefit of the legatee's name
 off their legatee, but it may often happen that
 the legatee if poor will be unable to become
 creditor.

When the executor has paid out all the estate
 properly, they may give a receipt to the
 all other claimants.

Contracting sometimes one in their own name,
 and sometimes in the name of the testator only,
 when the action is for an injury which happened
 after the testator's death. They may sue in their
 own names, thus they are not liable for costs, other-
 wise they are not liable for costs.

The executor is not obliged to avail himself
 of the right of limitation. Generally he is obliged
 to avail himself of the statute as a contract.
 But it is doubtful whether he is thus compella-
 ble when the claim is conscientious. Suppose the
 contract is indebted with you. Is the executor obliged
 to avail himself of the statute? On this question there
 is a diverse opinion. I think if the executor does
 pay the money still on such bond as he will not be
 liable for a disclaimer.

ltho 524.

Personal property is split in the hands of the exec^r.
 Part is a part; Part is a part, some is a remainder
 Part is a part, do not go to the exec^r. But if any
 of them are turned then shall go to the exec^r.

The annual rent for land ~~is~~ ^{is} not paid to the ~~exec^r~~
 the exec^r, the ground is, is not paid to the ~~exec^r~~
 but to the tenant. This is the law, when the tenant is a son
 or a daughter, but the rent is not paid to the
 exec^r goes to an under tenant goes to the exec^r.

Emblements are sometimes said to be
 a part of the estate. When one makes a field of corn
 or a field of emblements goes with the land.
 But in most cases emblements are personal prop-
 erty, & go to the exec^r, on the death of the tenant.
 Between the exec^r and the emblements are always
 personal.

Will require to think, obliged to the exec^r.
 There has been an entire abolition in the exec^r.
 since the old decisions. It was formerly said, that
 if they were ever so slightly obliged to the exec^r.
 hold as done so, they were not personal, and would
 go to the heir. But now whenever the heir can be
 removed without injury, it is personal and goes
 to the exec^r.

Reversions and Equities of Redemption are
 real effects.

Mortgages in the hands of the mort-
 gagee are personal property, & will pass in a will
 without being affected by the substitution of trustees.

either advanced in the thing, or he has not
 a piece of twelve men, or more, in a glass.
 And a comparison to the body, to be the fact
 by a jury, by twelve men. The name of the Estates
 Debtorship is carried over to a new set of persons
 administered, on the same basis of the exec; and
 tried without occasion to repeat suit as in C. C.

In C. C. there is no limitation to the claims
 as in the exec. It is otherwise in Court. Here those
 who have not presented their claims for settlement
 are not entitled to a dividend with the rest.

In C. C. & every where else, there is a priority
 of debts. Here administration is a proper view. But
 in Court it is no idea except as to the claims of
 creditors.

The exec. or adm. here may always represent
 the estate insolvent; if they think proper. Com-
 missioners are then appointed, who examine, and
 admit or reject the claims which are presented.

The cred. whose claim is rejected, may appeal to
 the C. of Probate, and an affirmance by that
 is conclusive. But if the claim is admitted by
 the C. of Probate, the exec. is not concluded.

As bonds are here always given, administration is never
 pleaded the remedy of ad. hoc bond. Our Law on this sub-
 ject is very equitable, & much preferable to the C. C.

In the C. C. Bankrupt Law, the object of their legisla-
 ture seems to have been to make people honest while
 living. The signs ascribed in the settlement of estates has been
 said to be, the better than, so often, that are desired.

Appendix

Question — If a sheriff breaks open an outer door, and so becomes liable as a trespasser, and to an indictment for breach of the peace, and arrests the offender is the arrest legal or not?

In the affirmative — If an execution levied on goods, after such breaking is lawful, and good, altho' the sheriff would be liable as trespasser. See Year Book 18 Edw. 4 page 2, pl. 19. — 5th Remaine's case (Mad 95. 5 Mar 95. Rpt 263 —

And as it is well settled that an arrest is legal after entrance and as the remedy given by law agt the sheriff in trespass must be supposed adequate to recompense the sheriff, there seems to be no reason why the reason to the arrest should not be legal.

See 1 Galb. 180 — where it is said a sheriff may be a trespasser, but the execution is good. — Pac. ult. Exp 707.

Contra! It seems to be agt police thus to admit persons at a building entrance to pass the benefit of a breach of the peace. On the same principle the officer might take a debtor in false imprisonment on Sunday and thereby keep him till Monday and levy his execution which would be valid. —

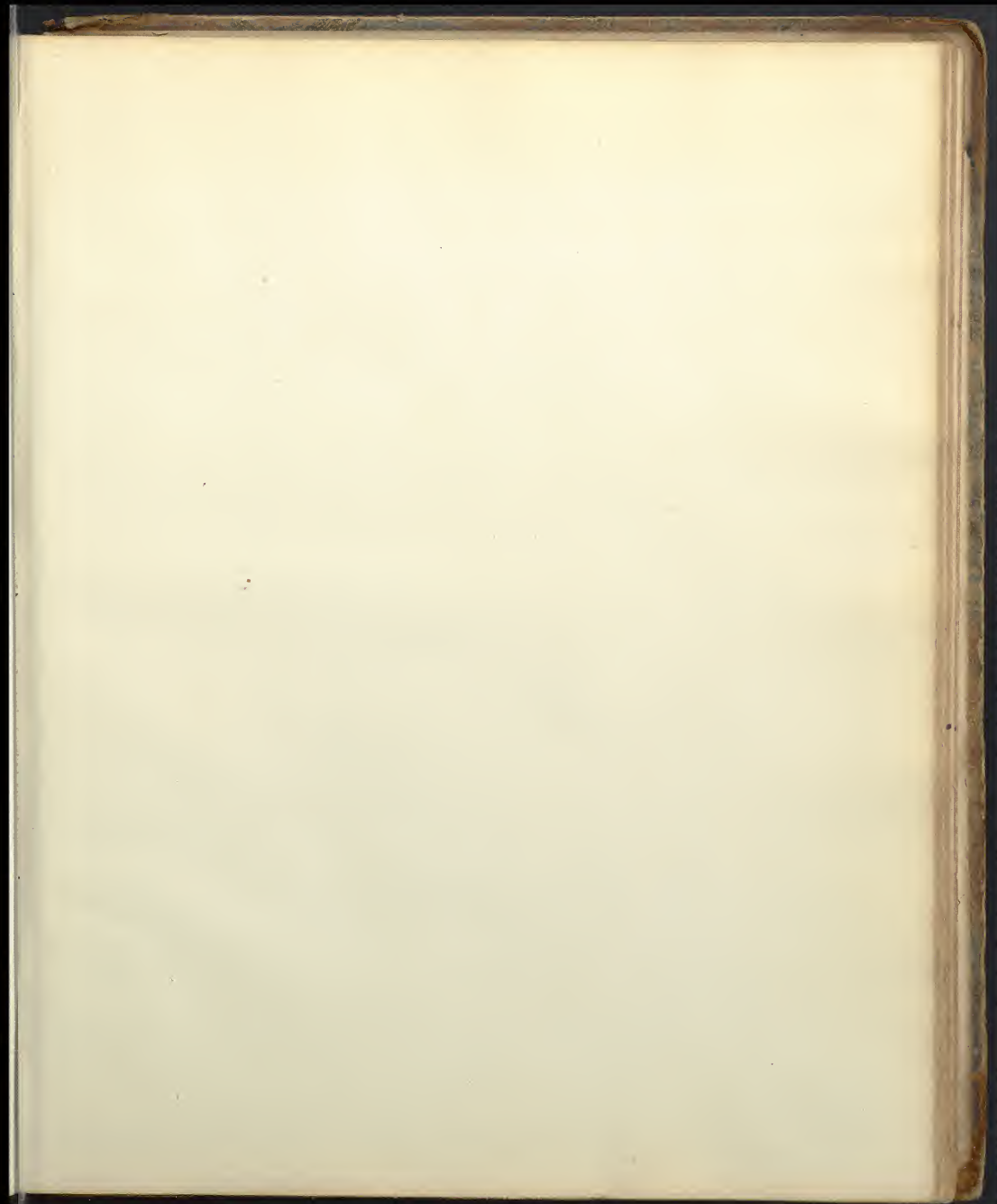
It appears from the case in Cowp that there has been a revolution in sentiment since the decision in Coke — Lord Mansfield bent the whole force of his reasoning to prove that the breaking was of an inner door & not an outer one — Now if the point controverted was law, it would surely be unnecessary to discuss that subject, for the execution would have been justly levied, for the debtor would have been entitled to his action of trespass for the breaking. The maxim that no man shall derive benefit from his own wrong applies here very strongly.

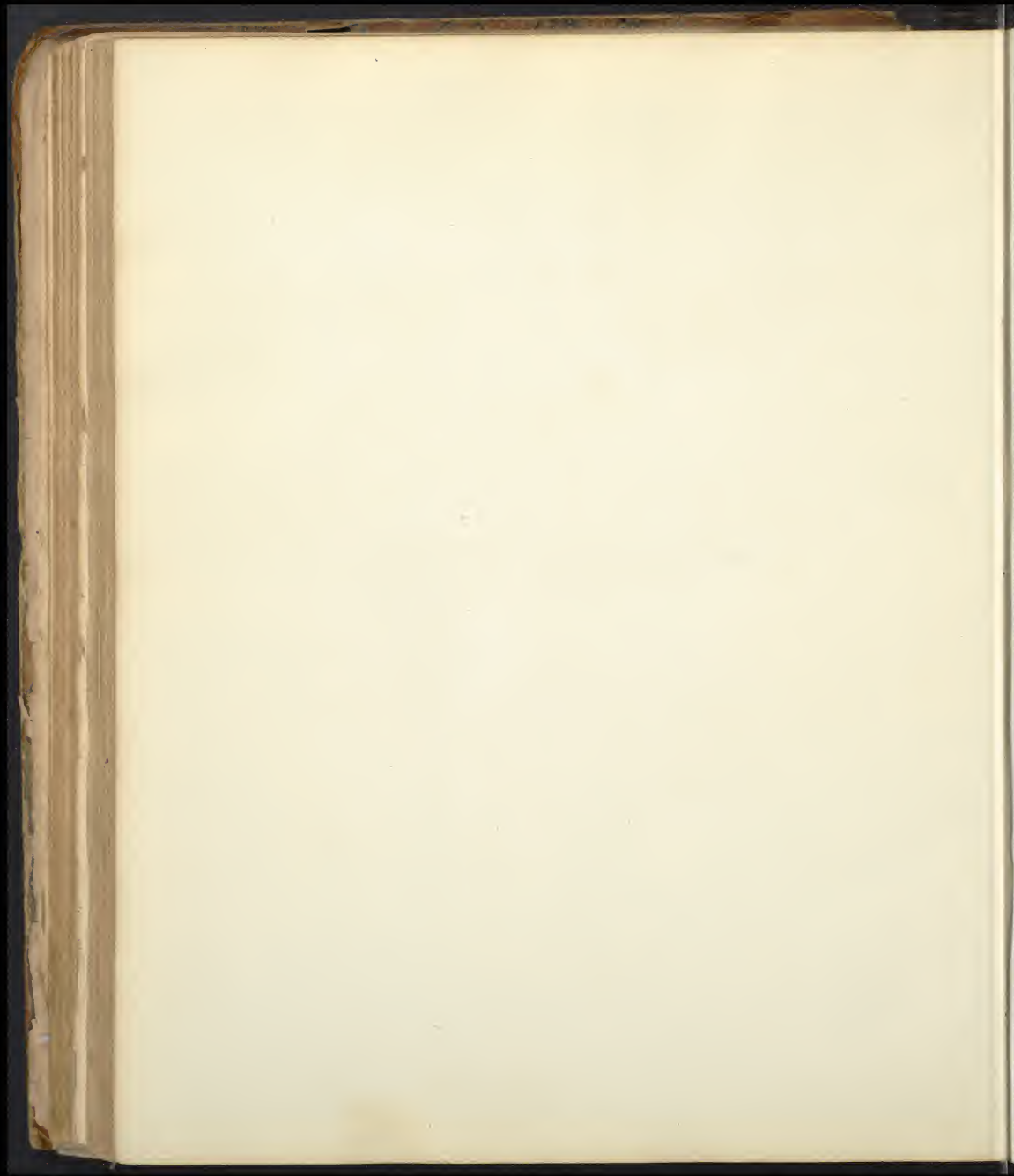
See Lord Mansfield's opinion immediately following in the text of the case from the year book. 1200 Exp. 505

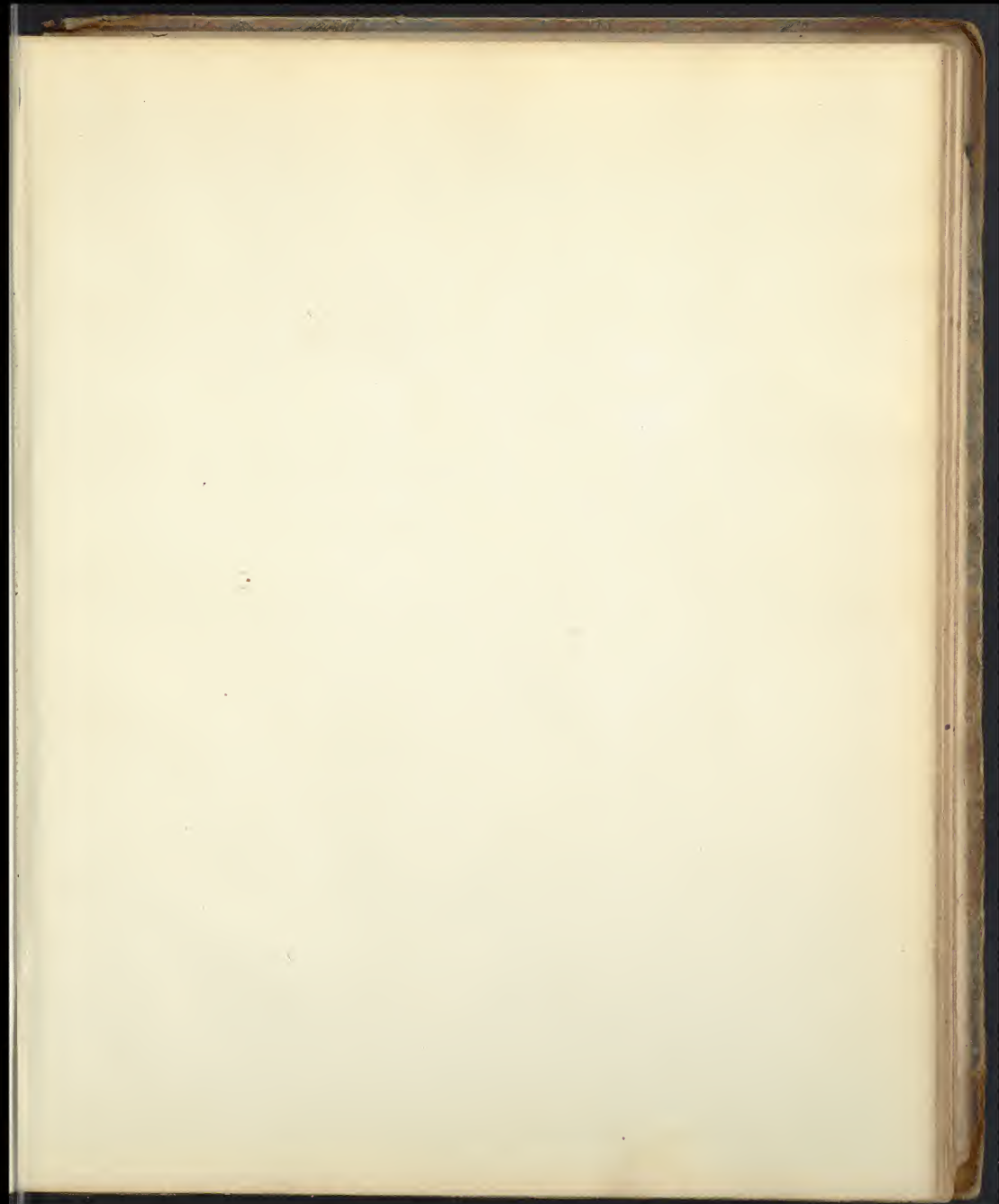
also vide 5 Nov. R. 170 note } 1 Bl. Rep. 823 } the same question is decided to disallow the process in a similar case

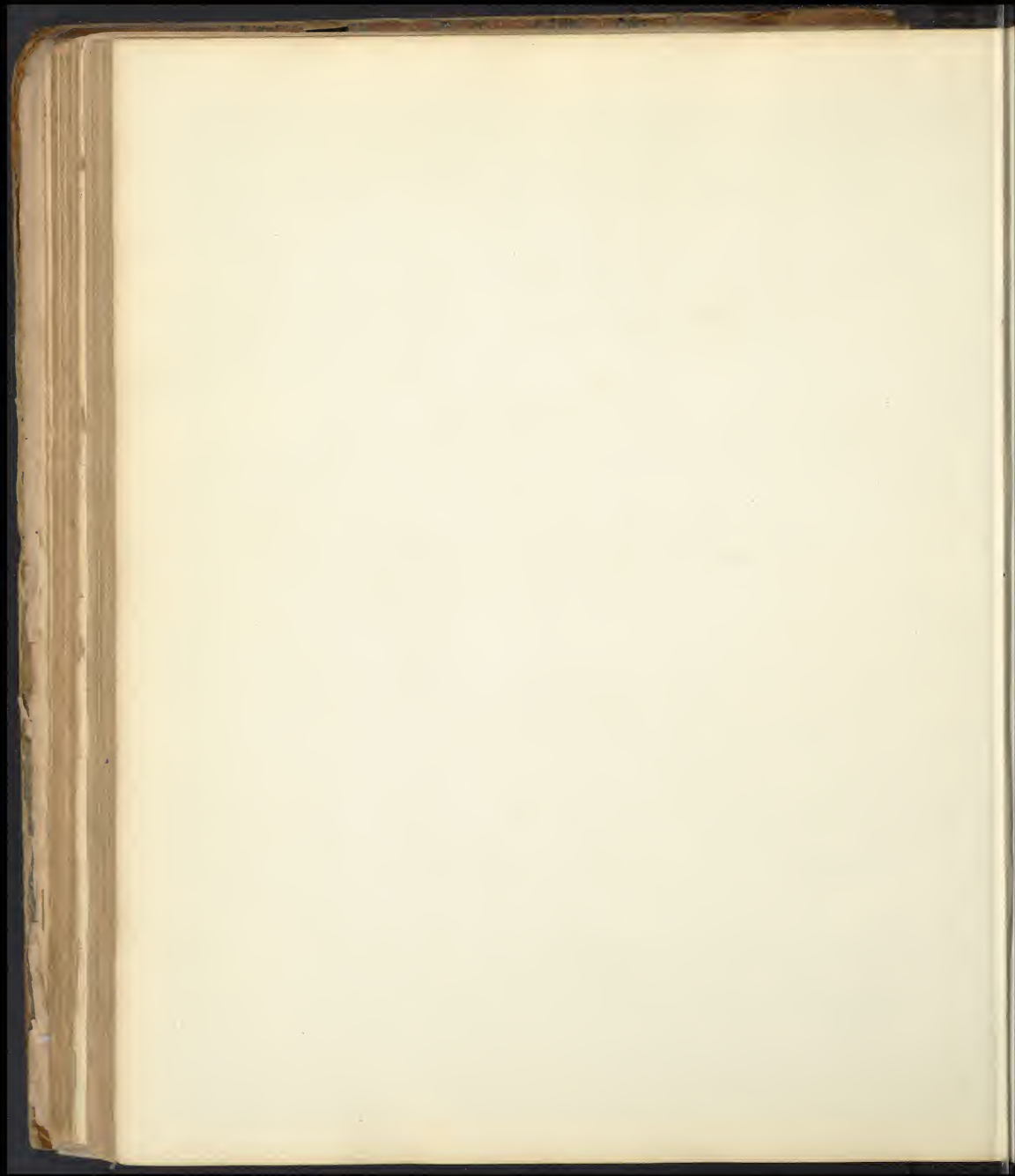
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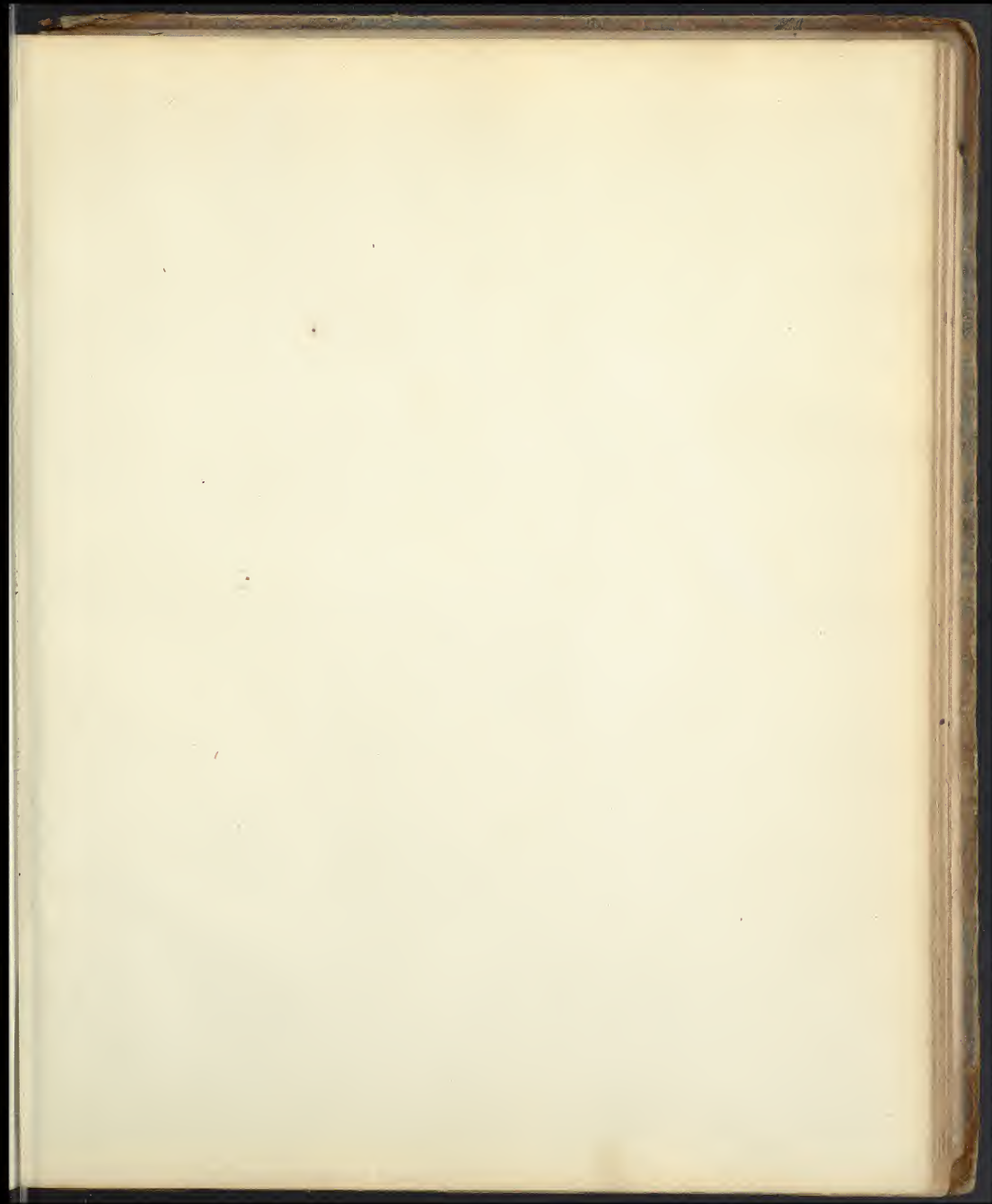
Appendix
In Massachusetts personal estate

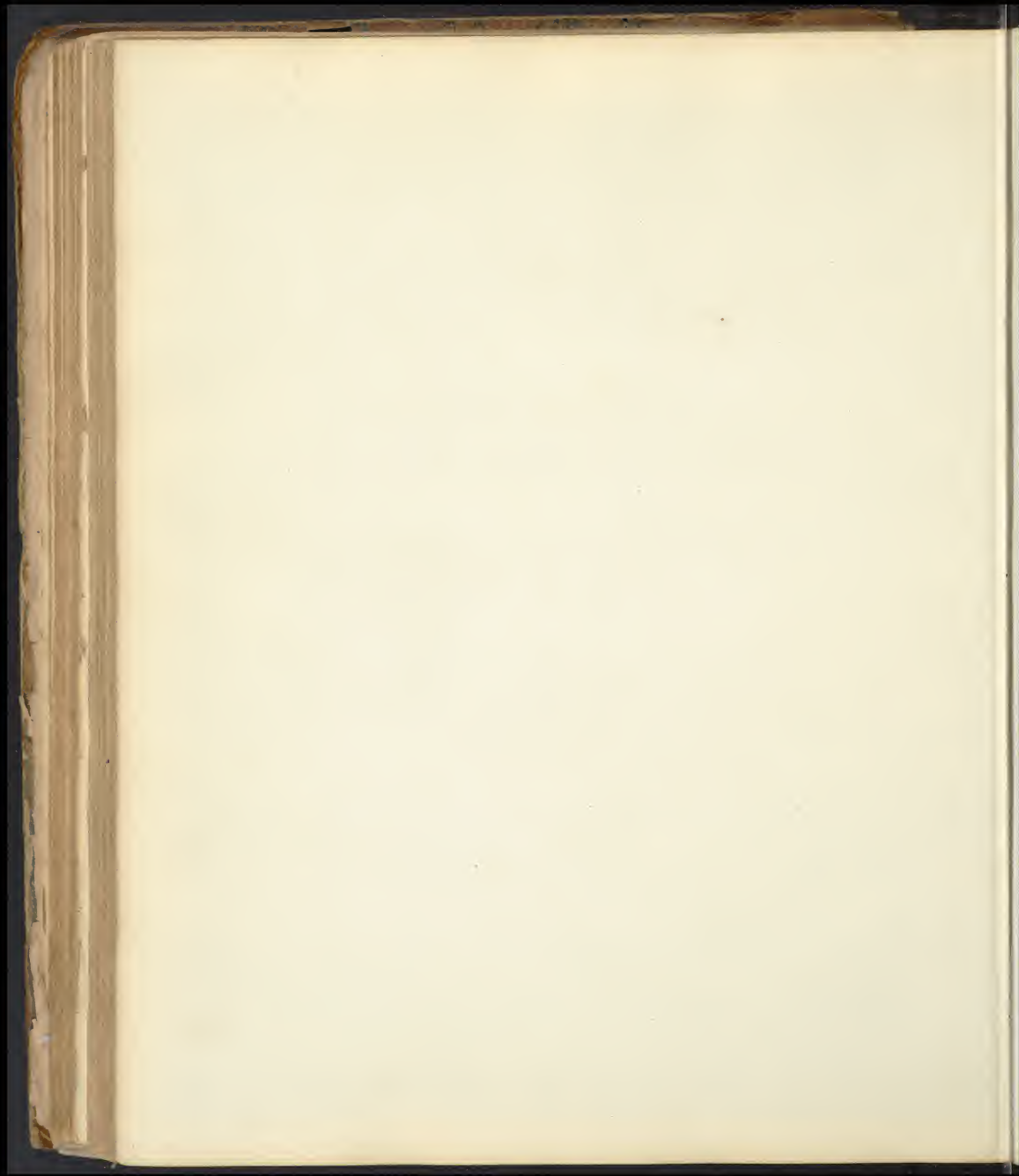


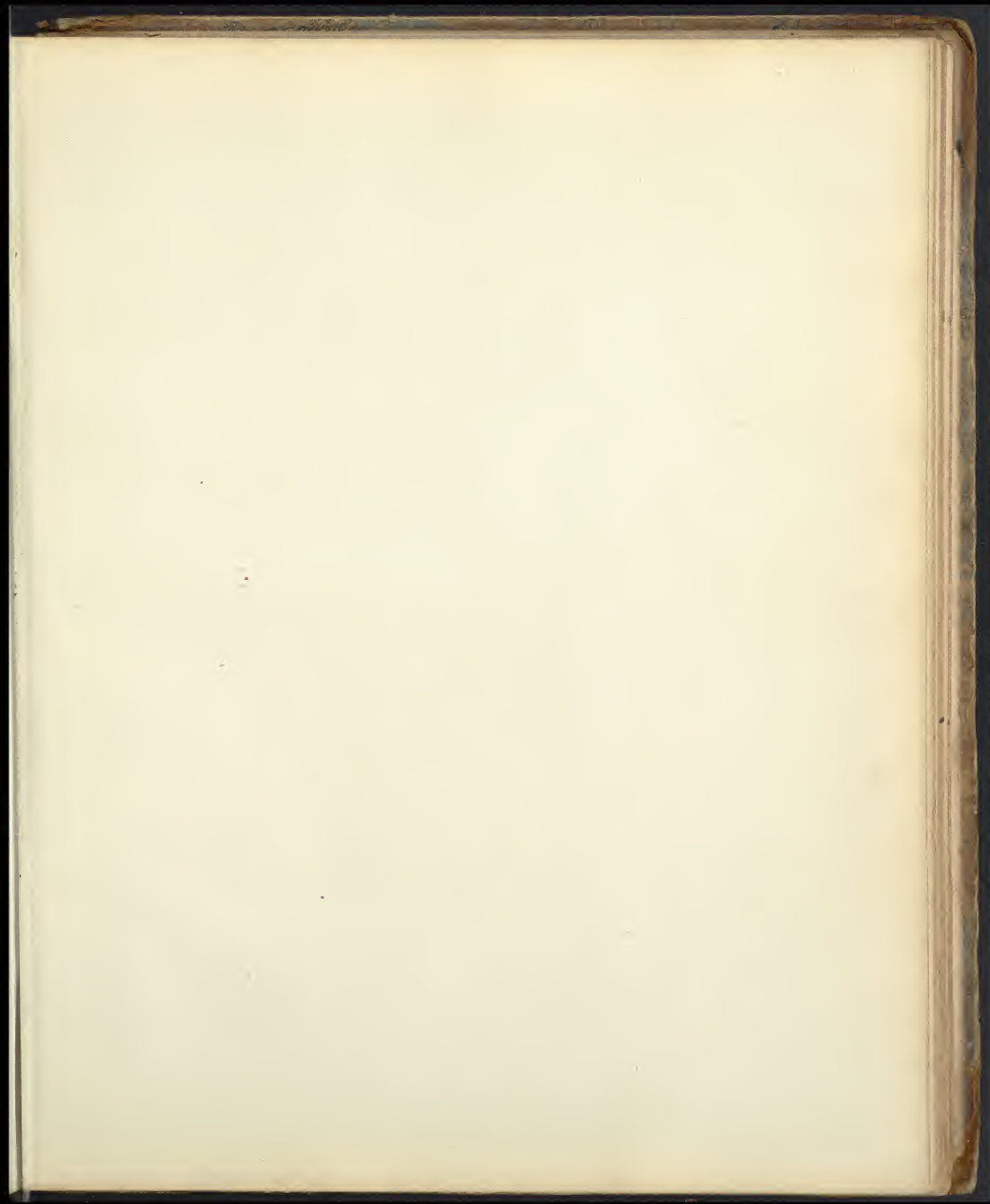


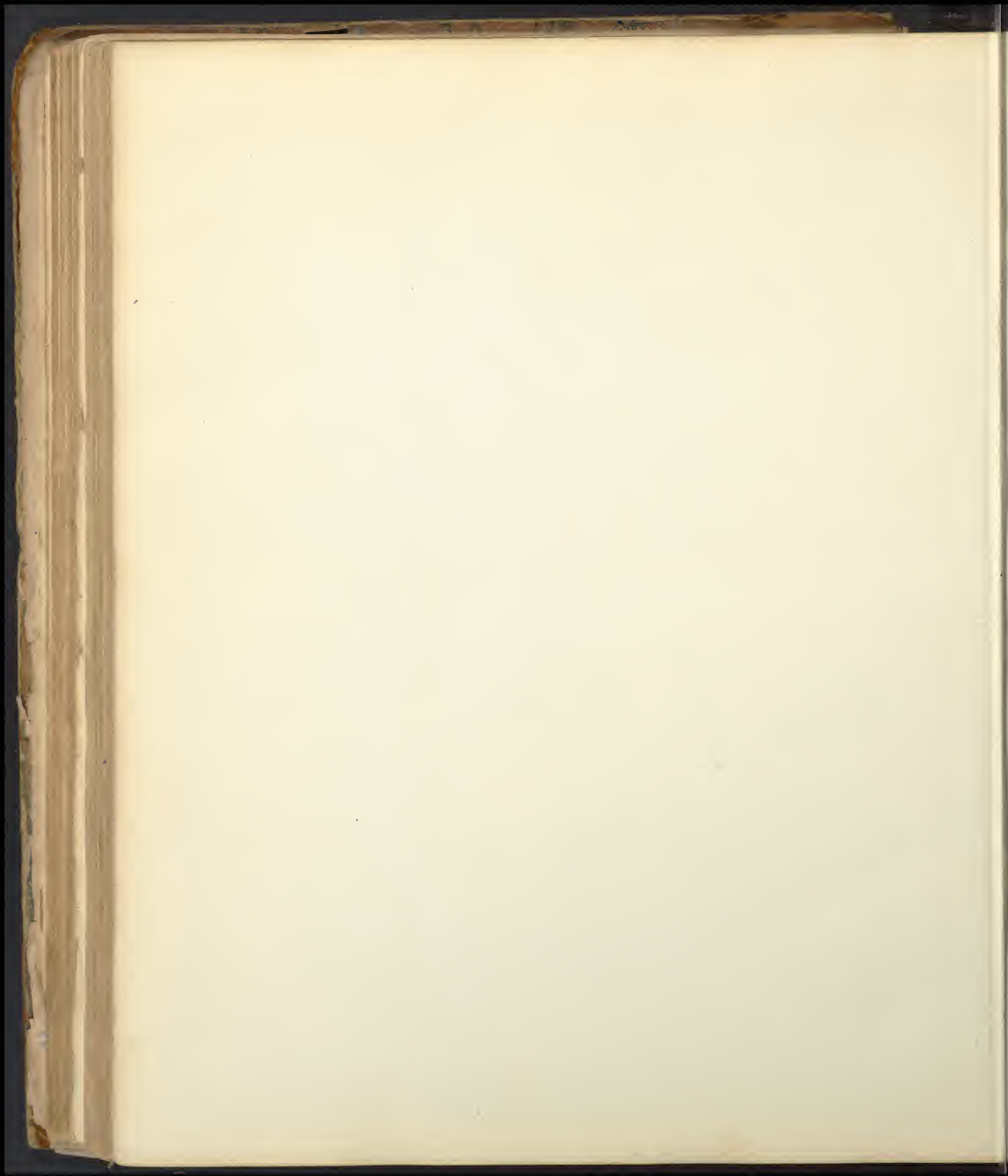


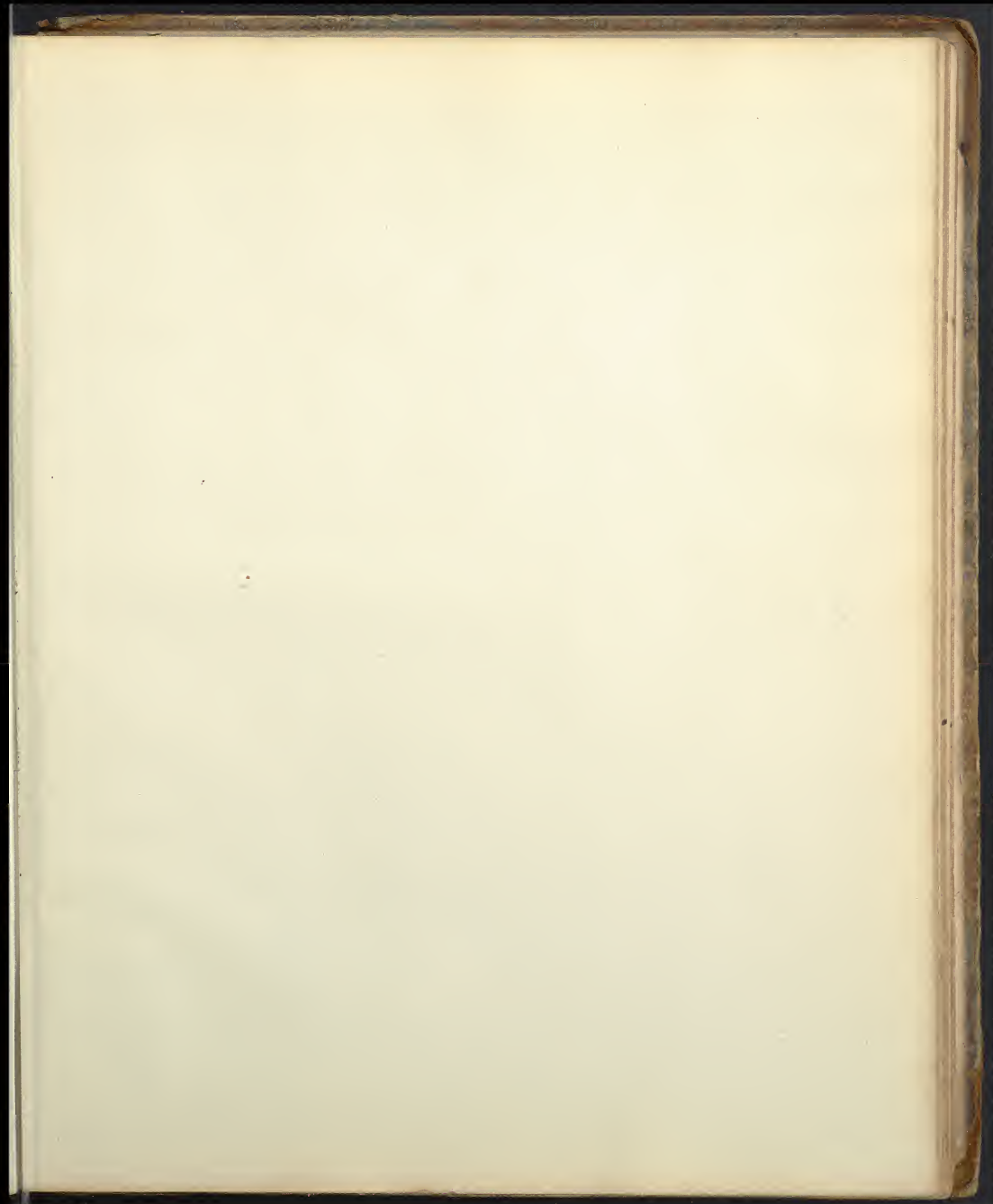


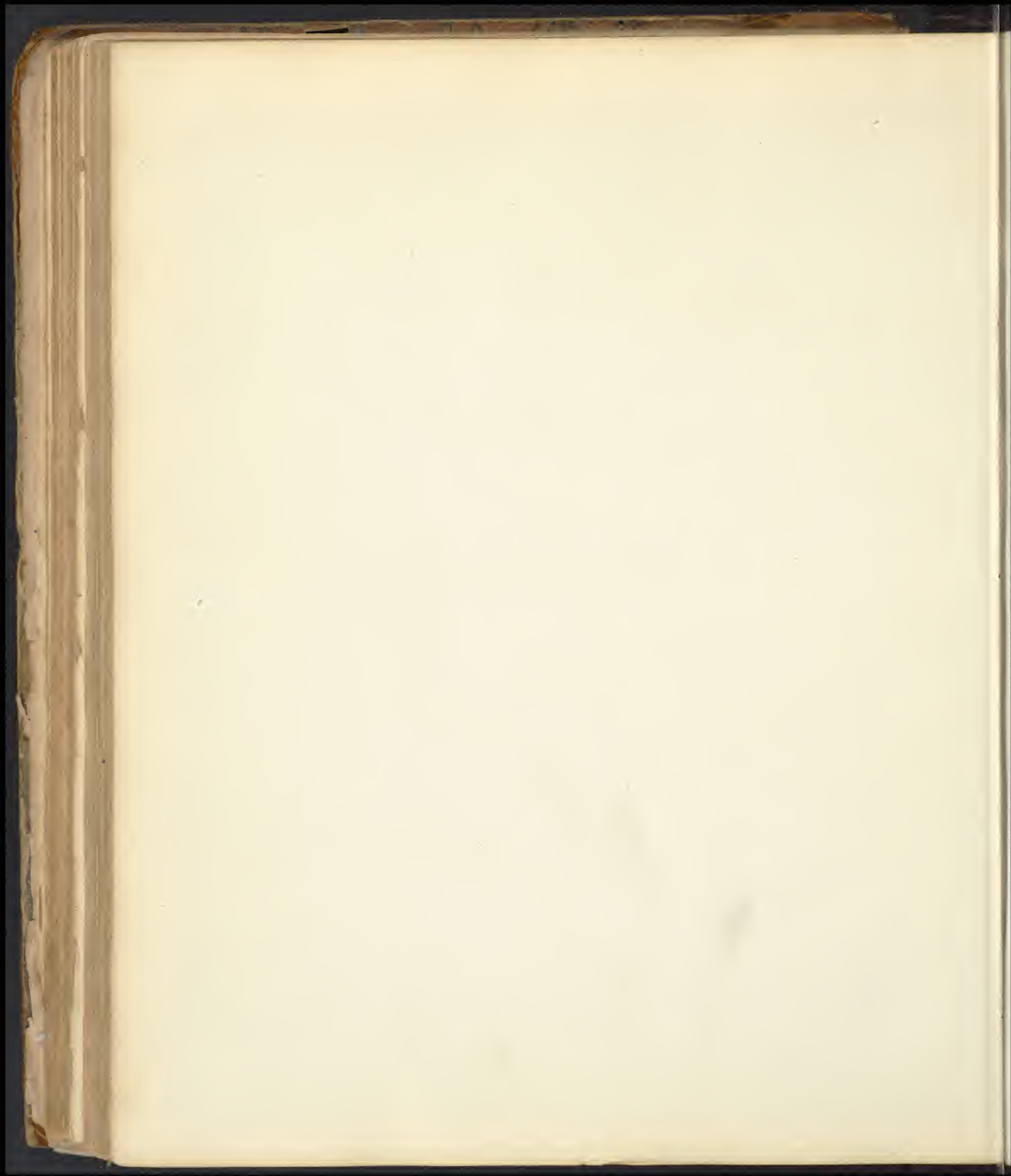


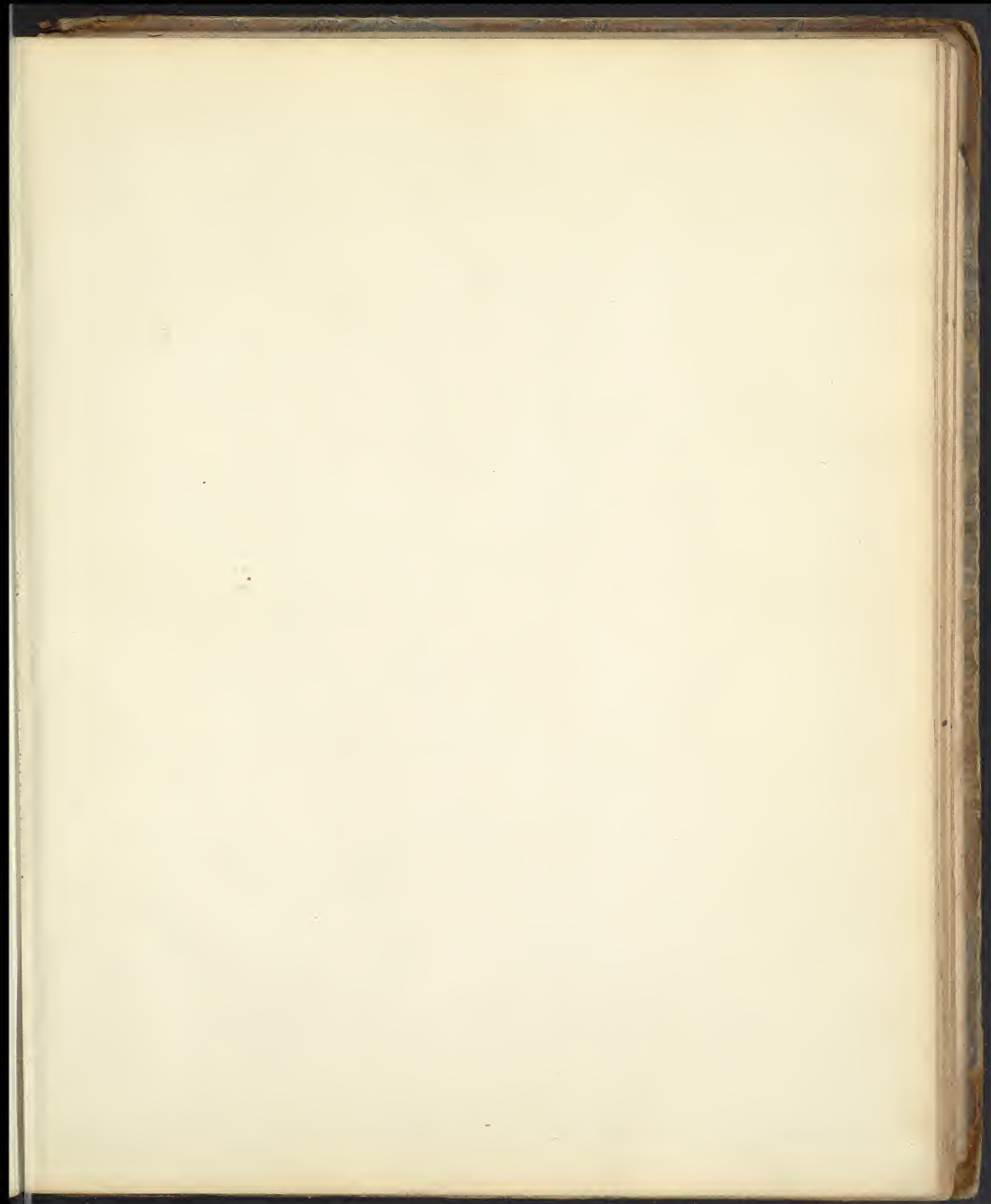


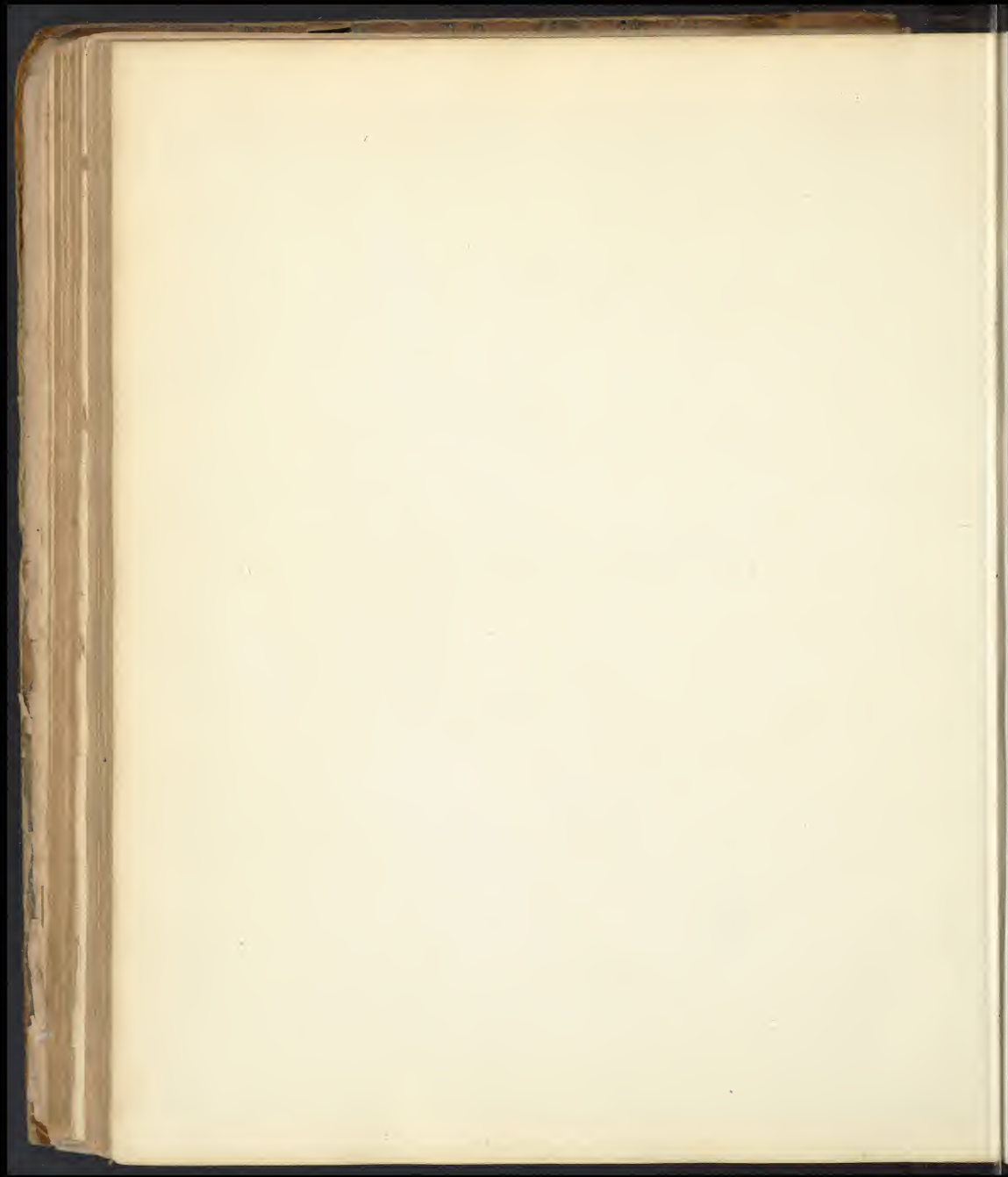


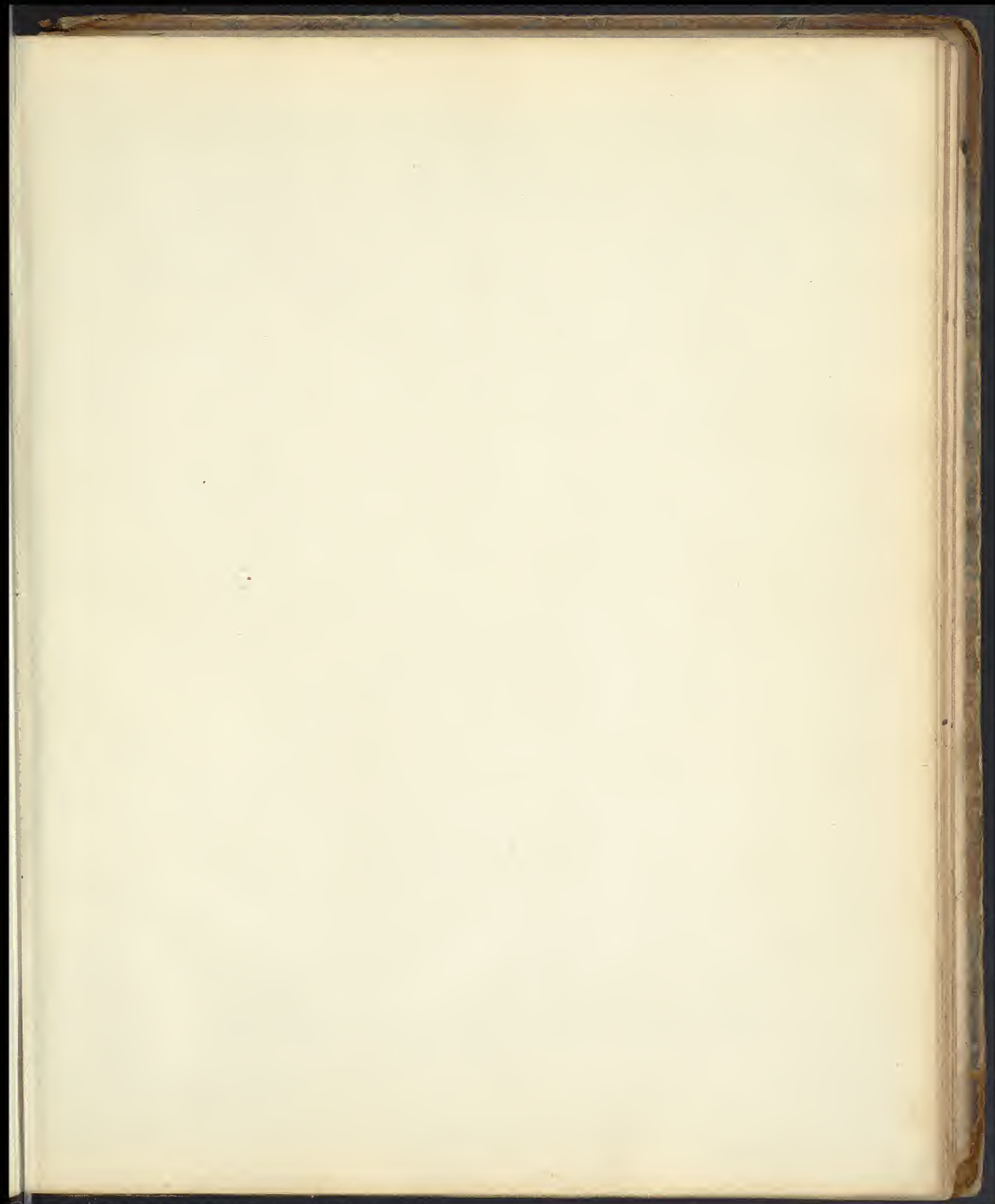


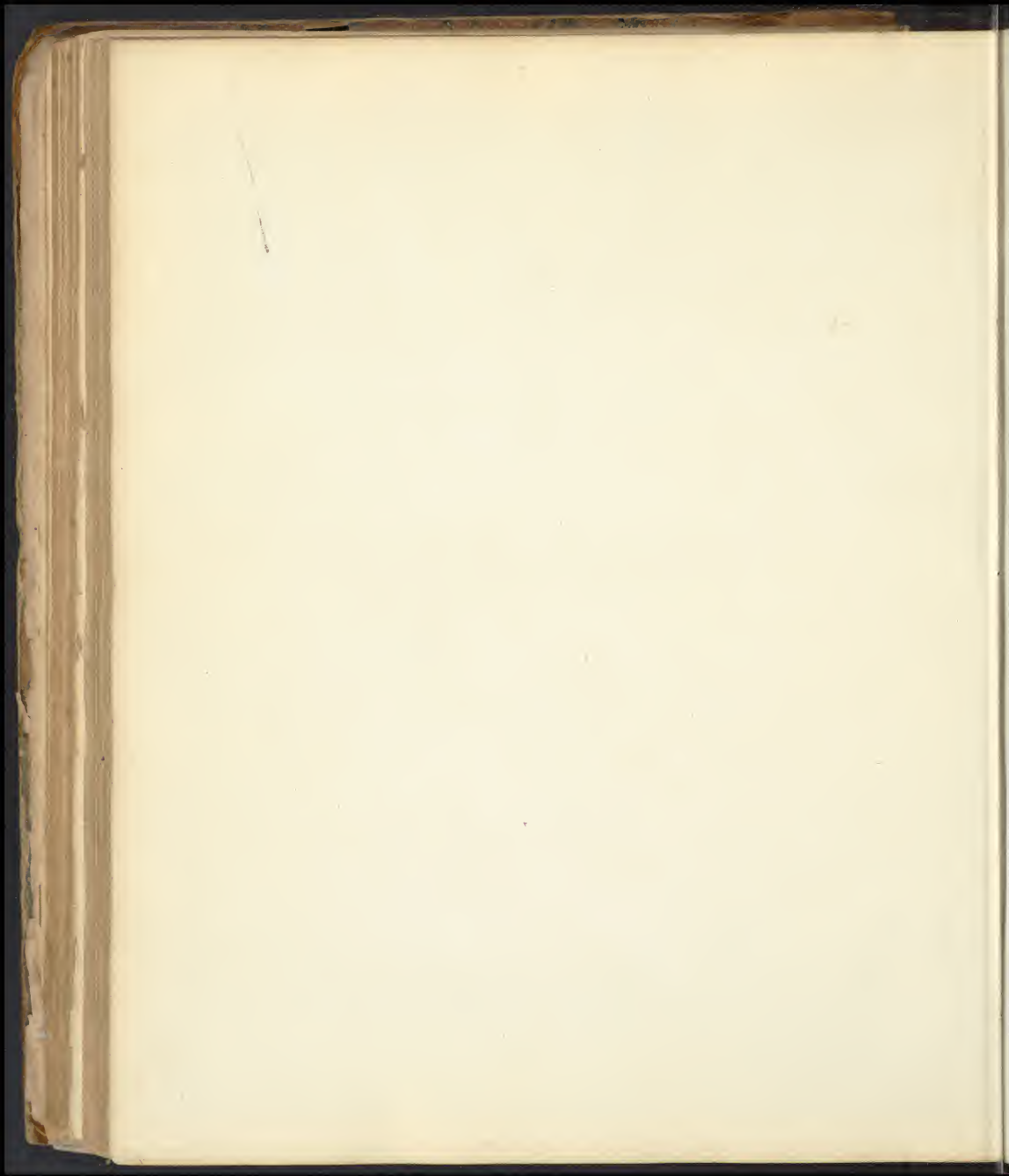


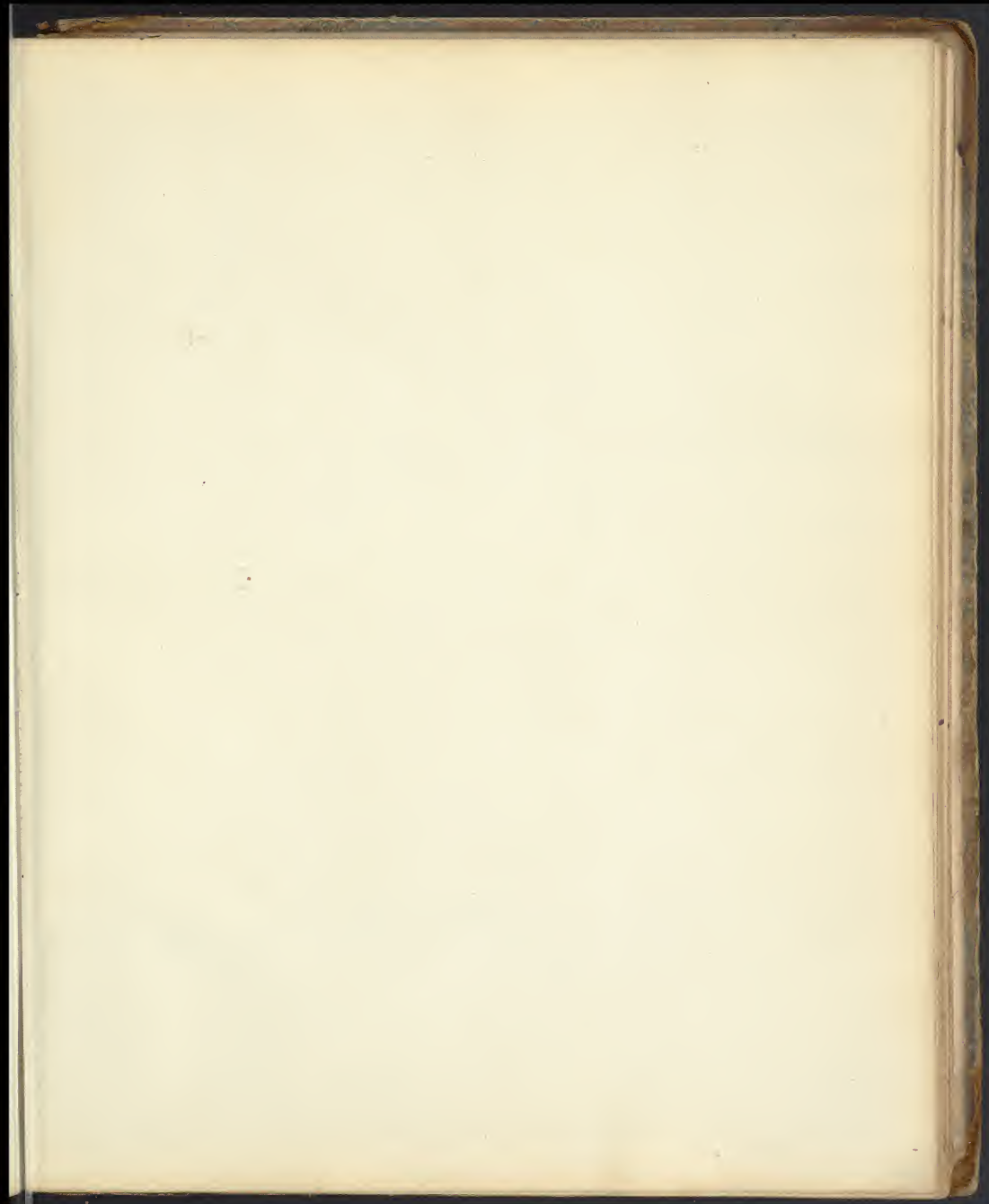


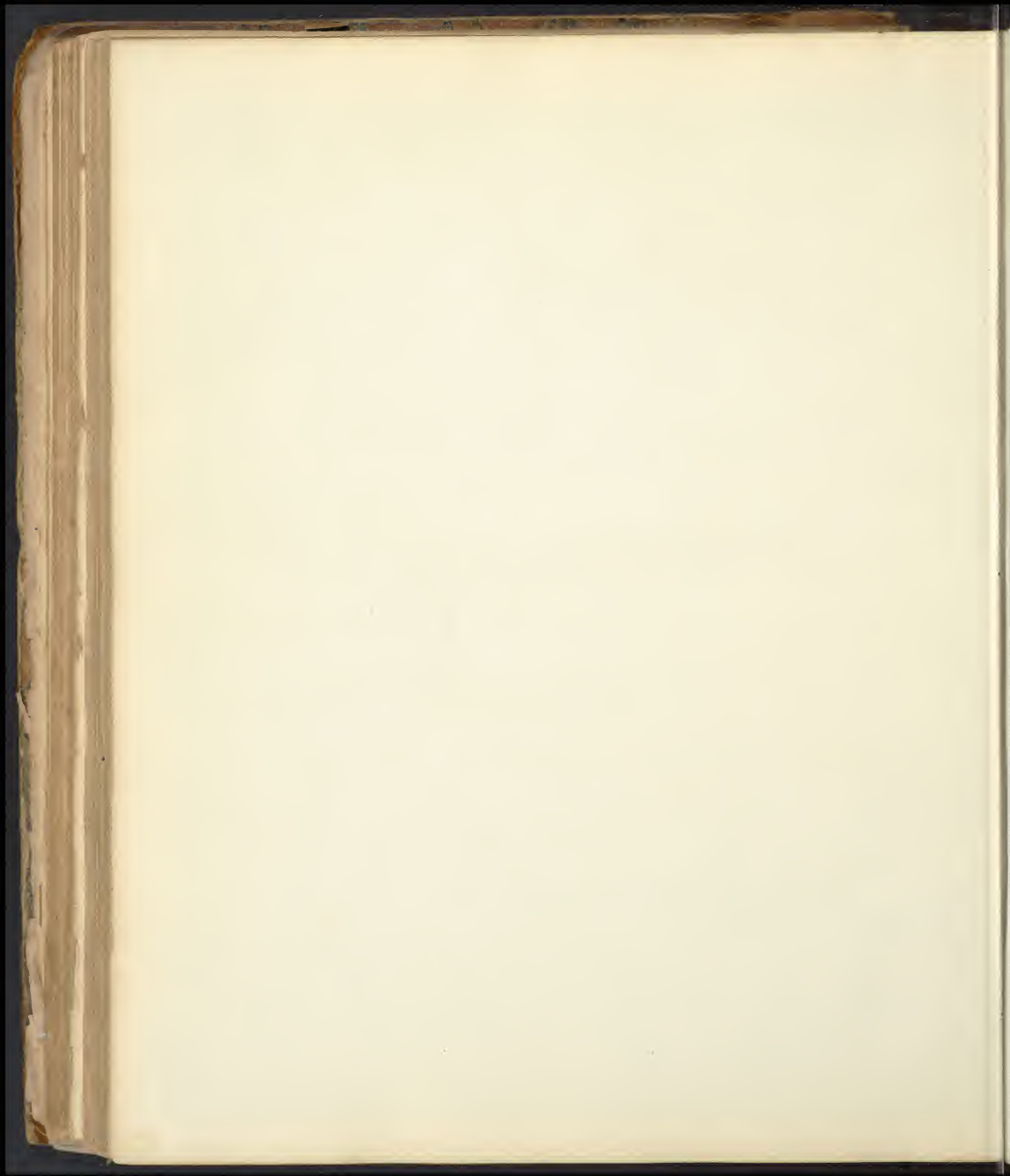


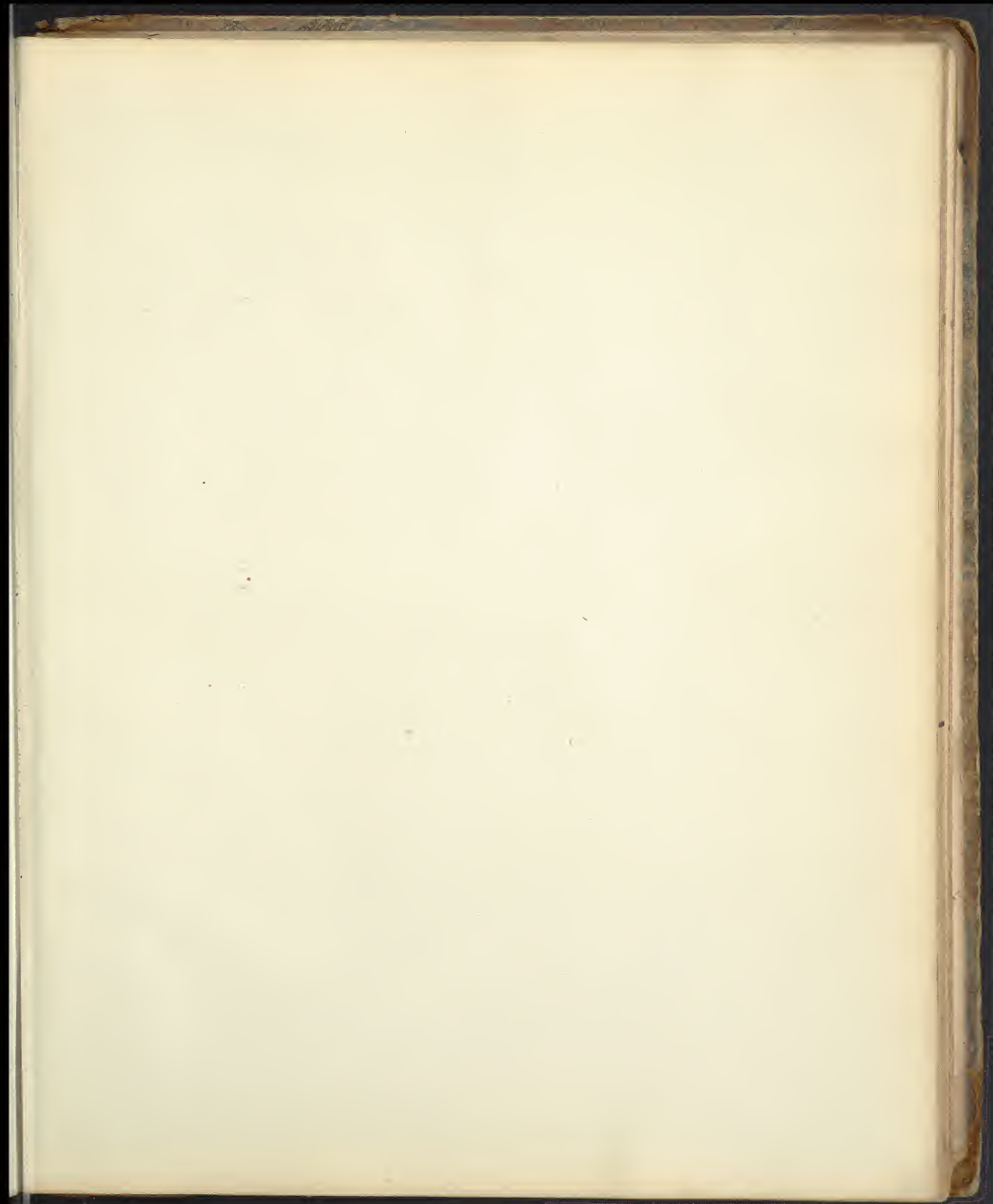


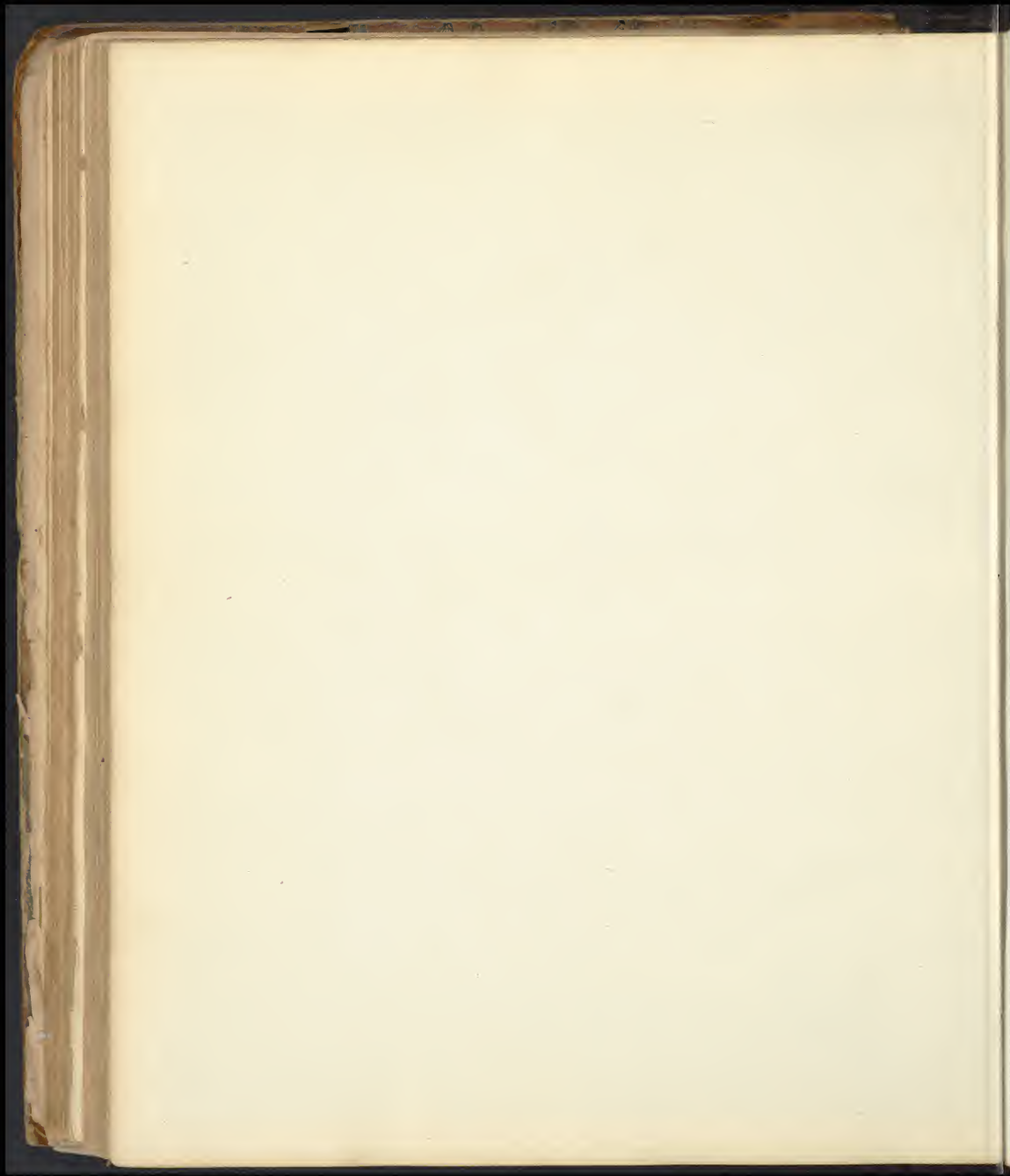


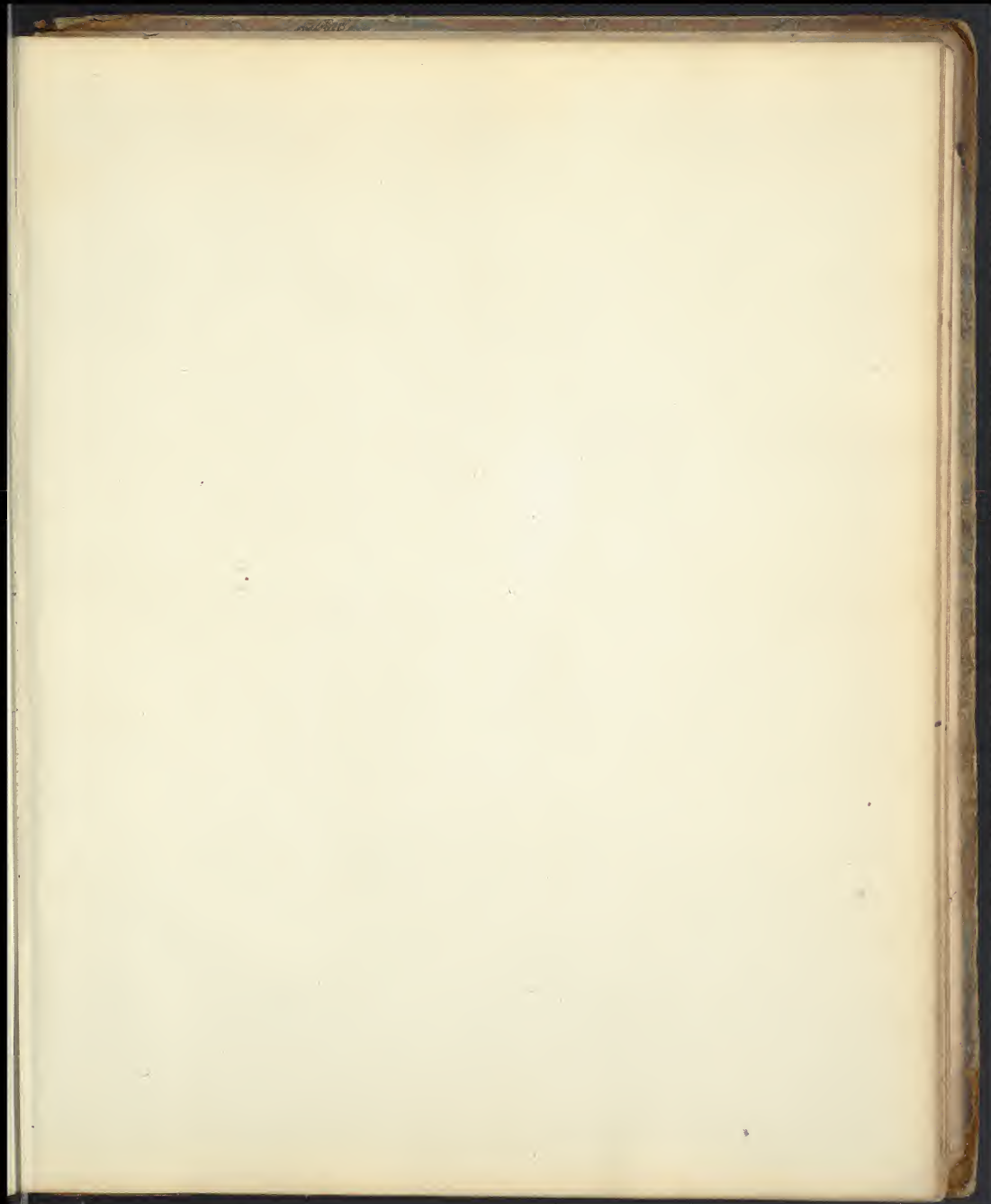


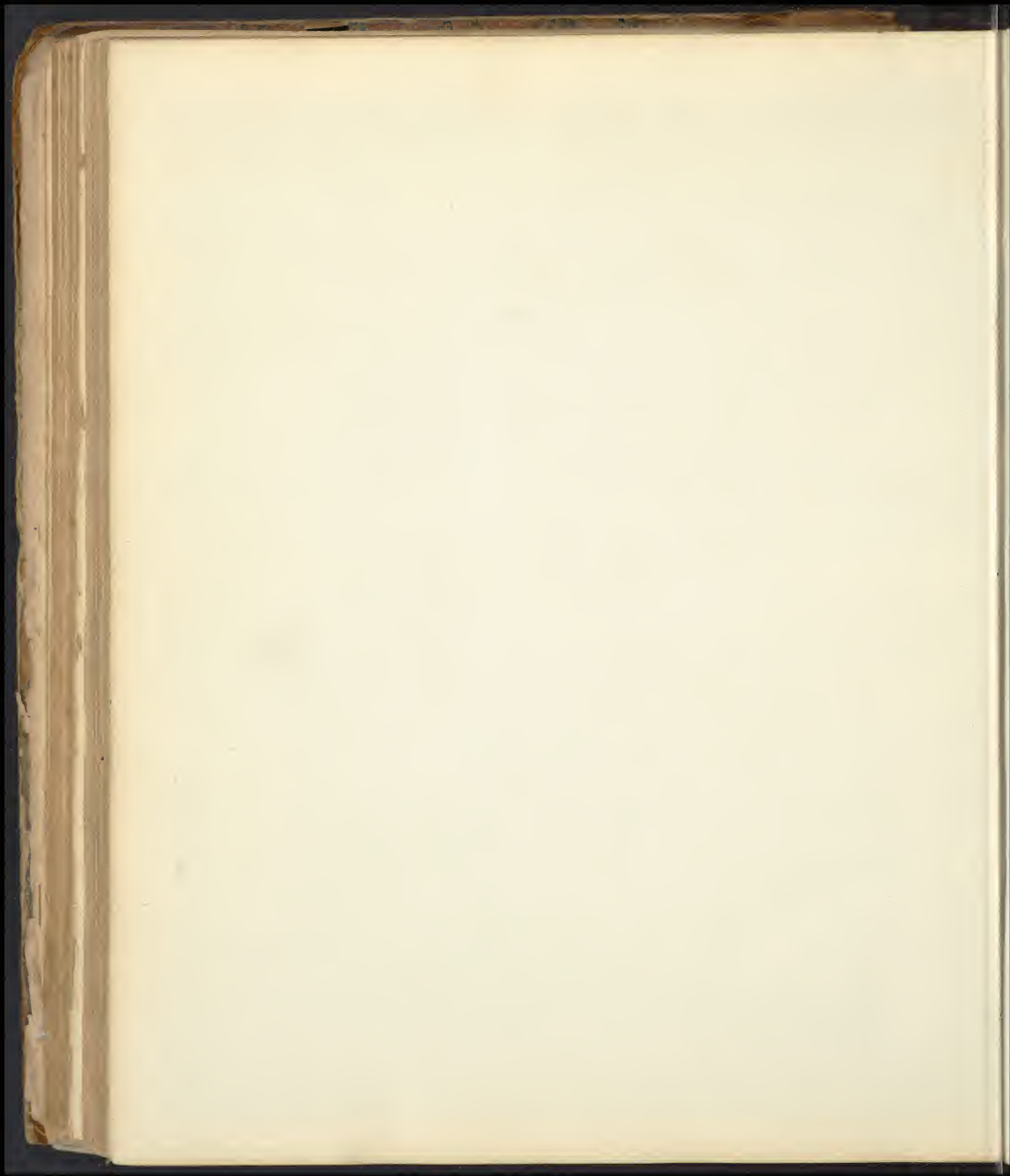


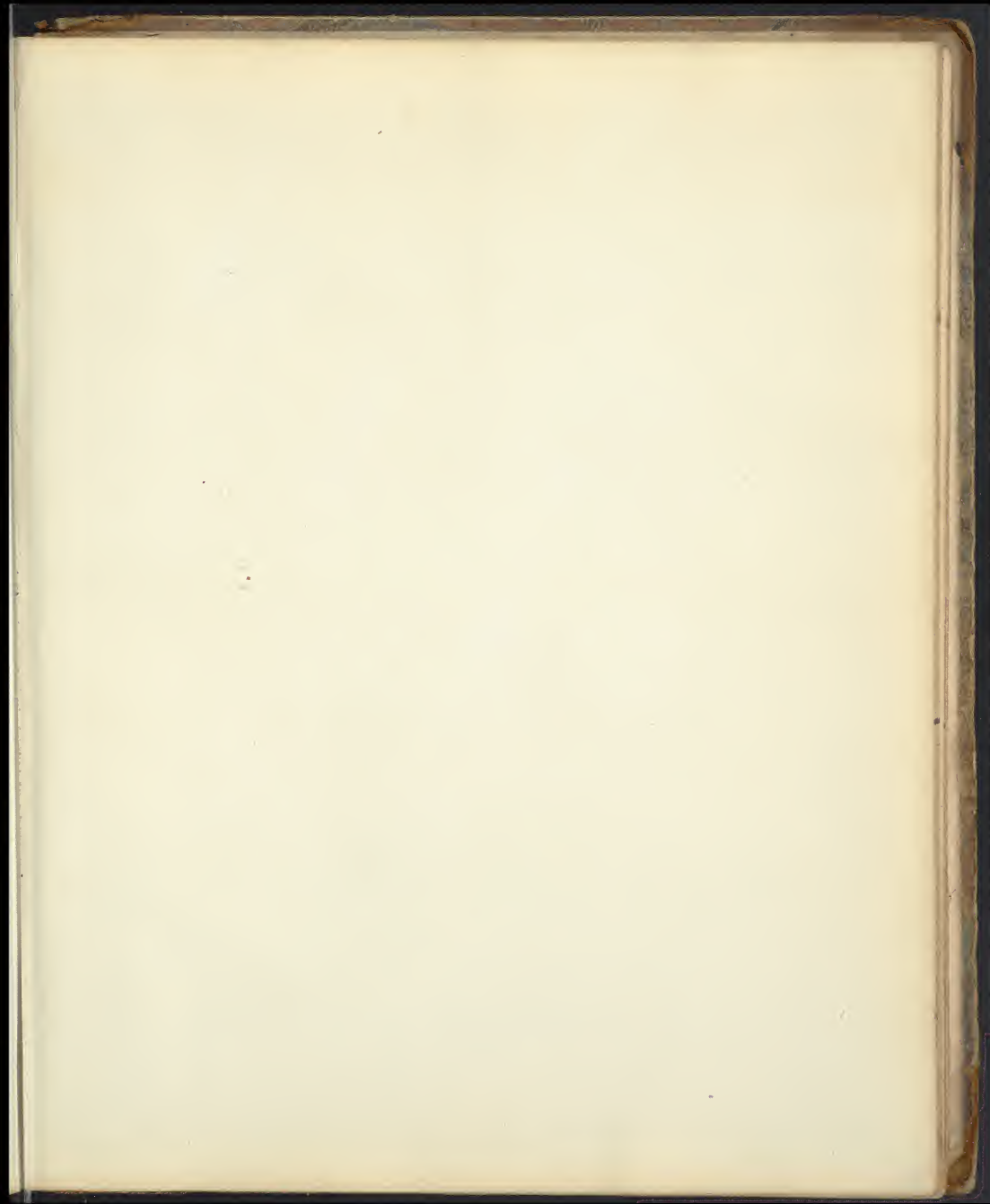


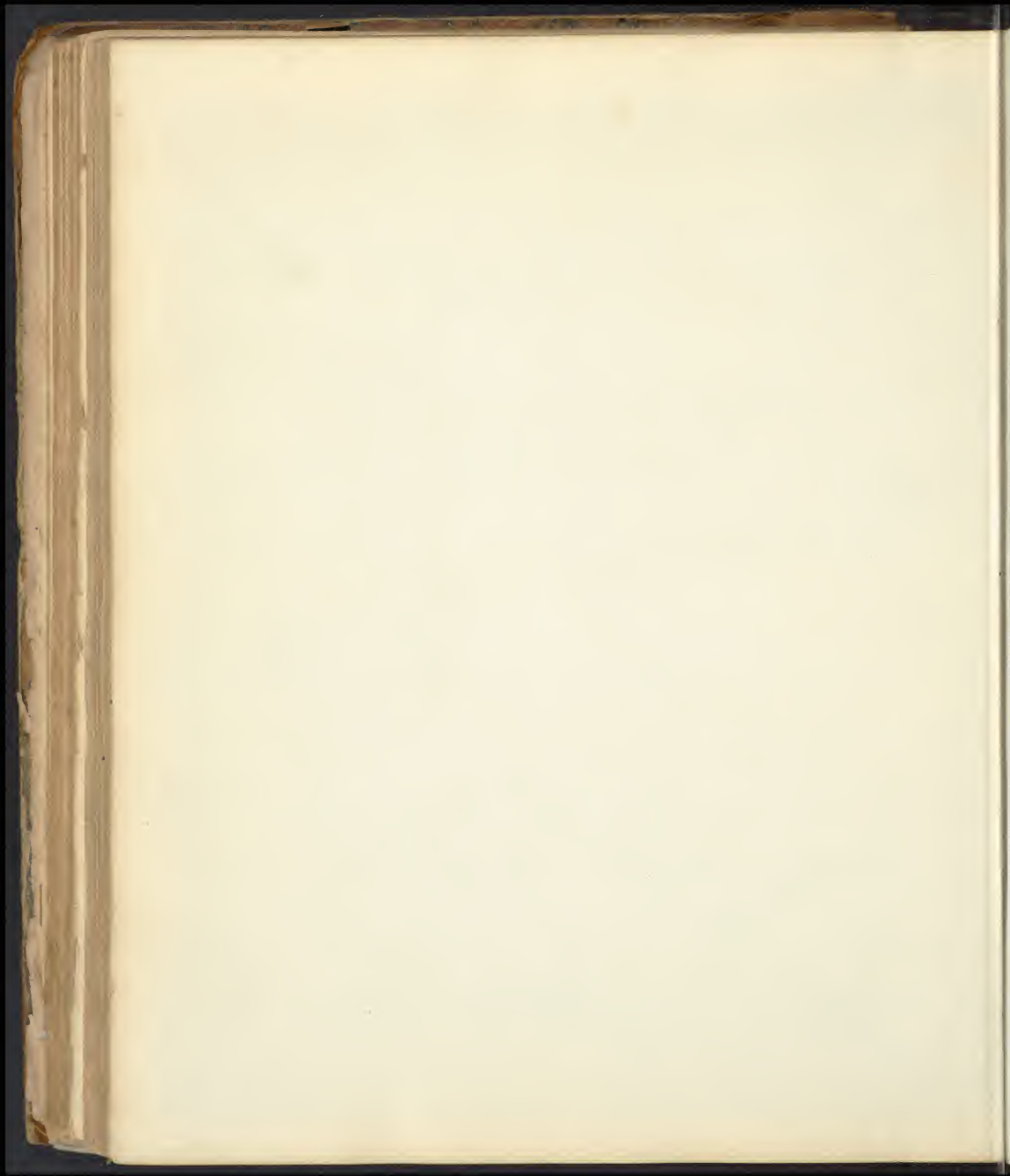


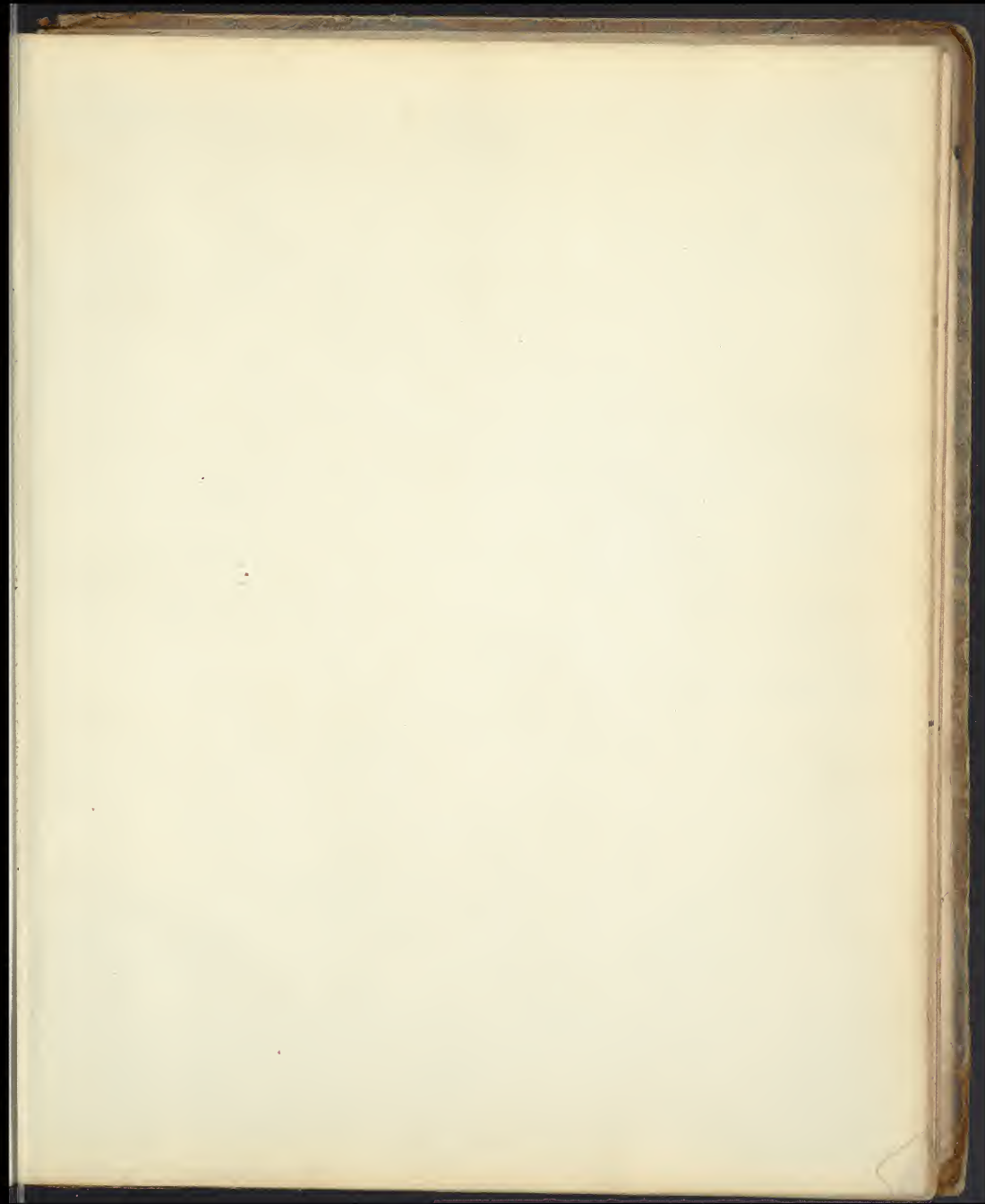


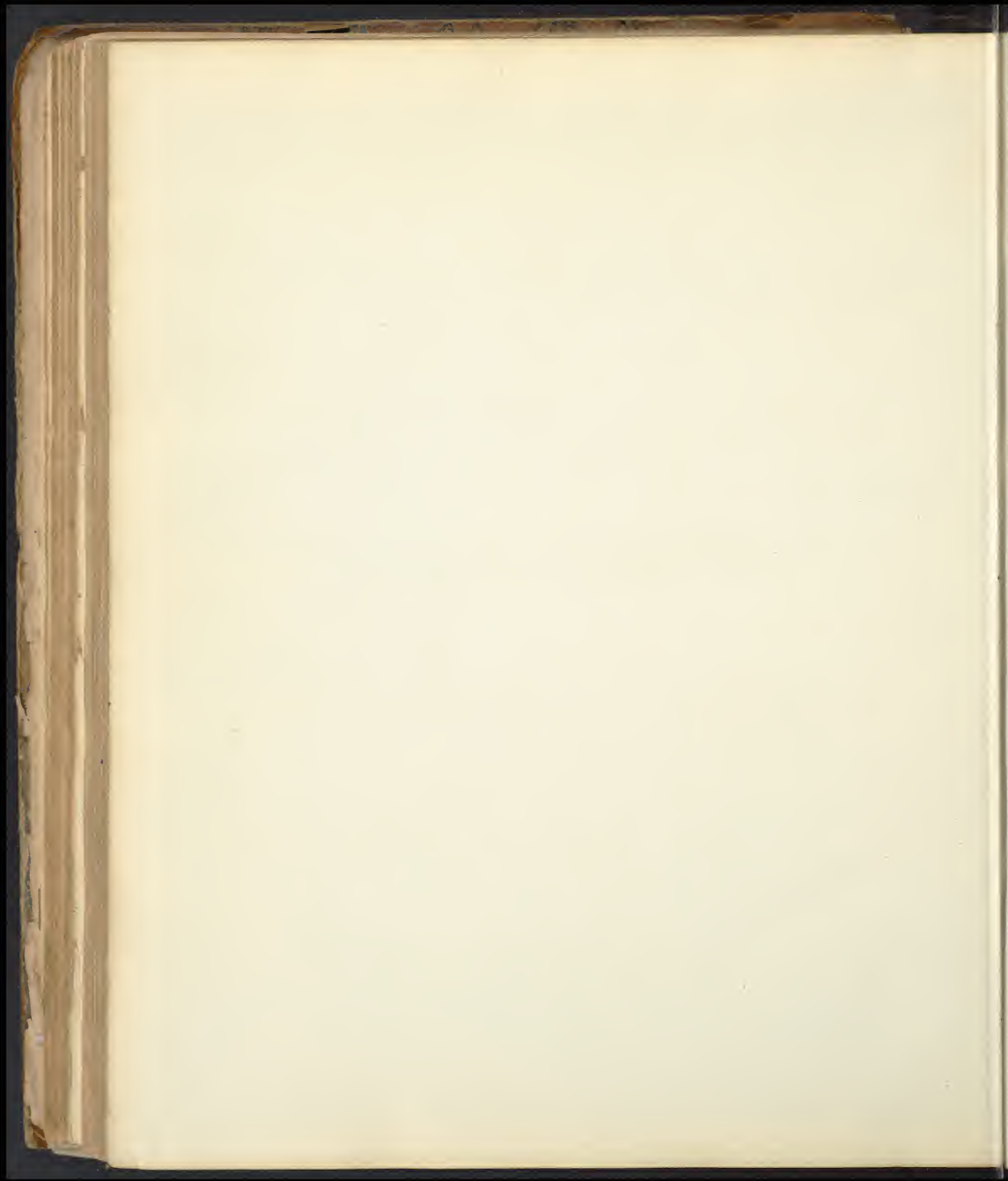


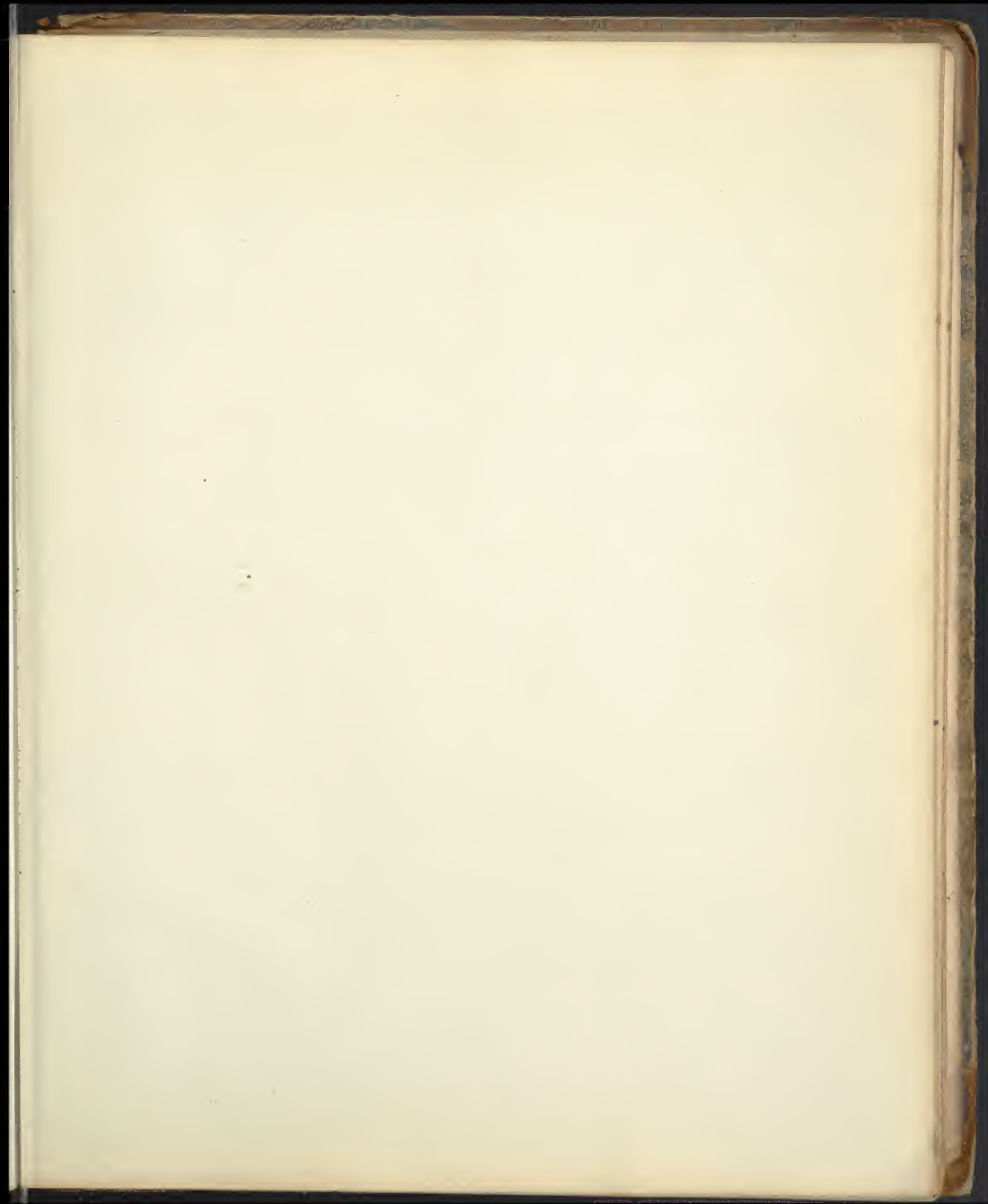


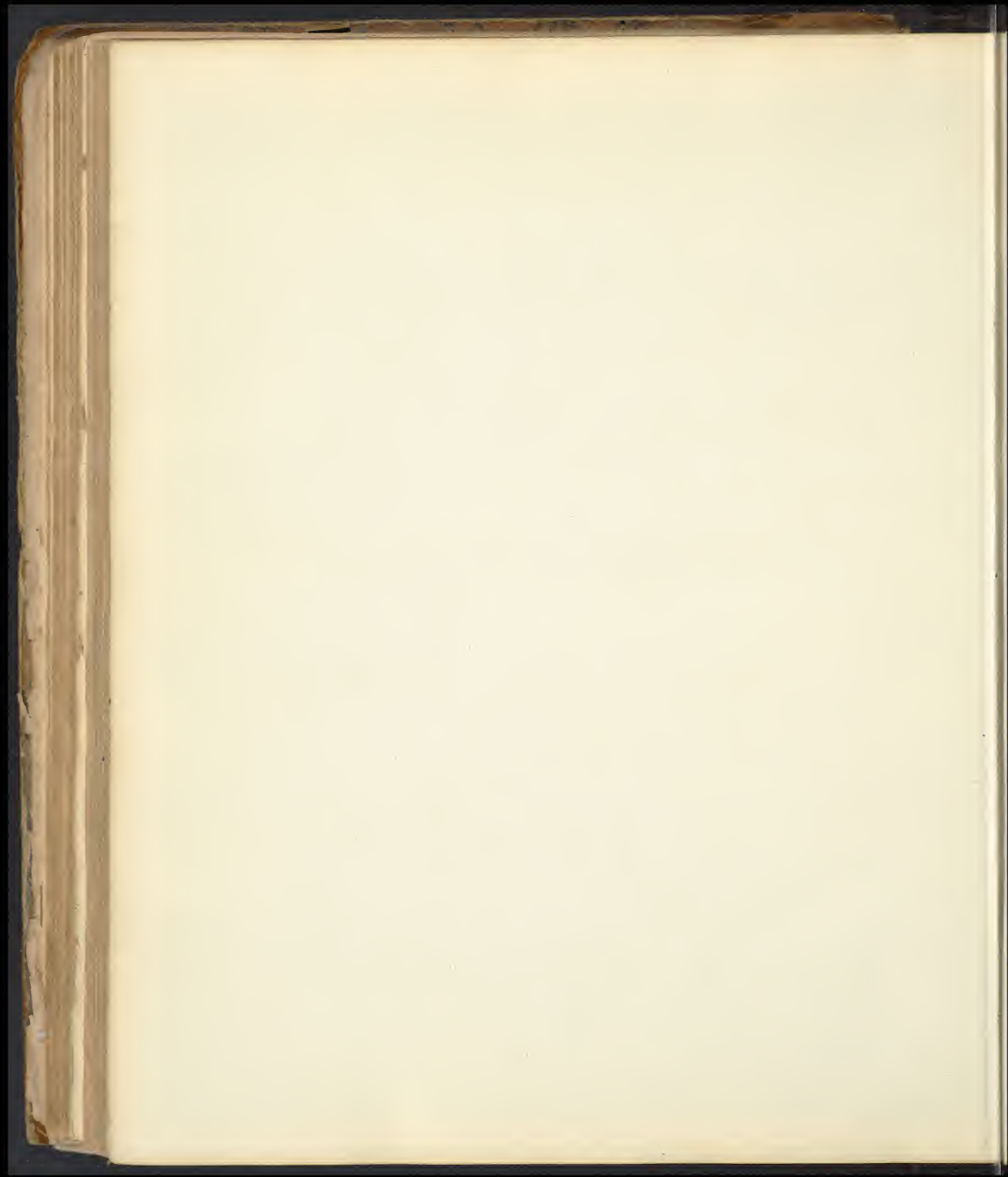


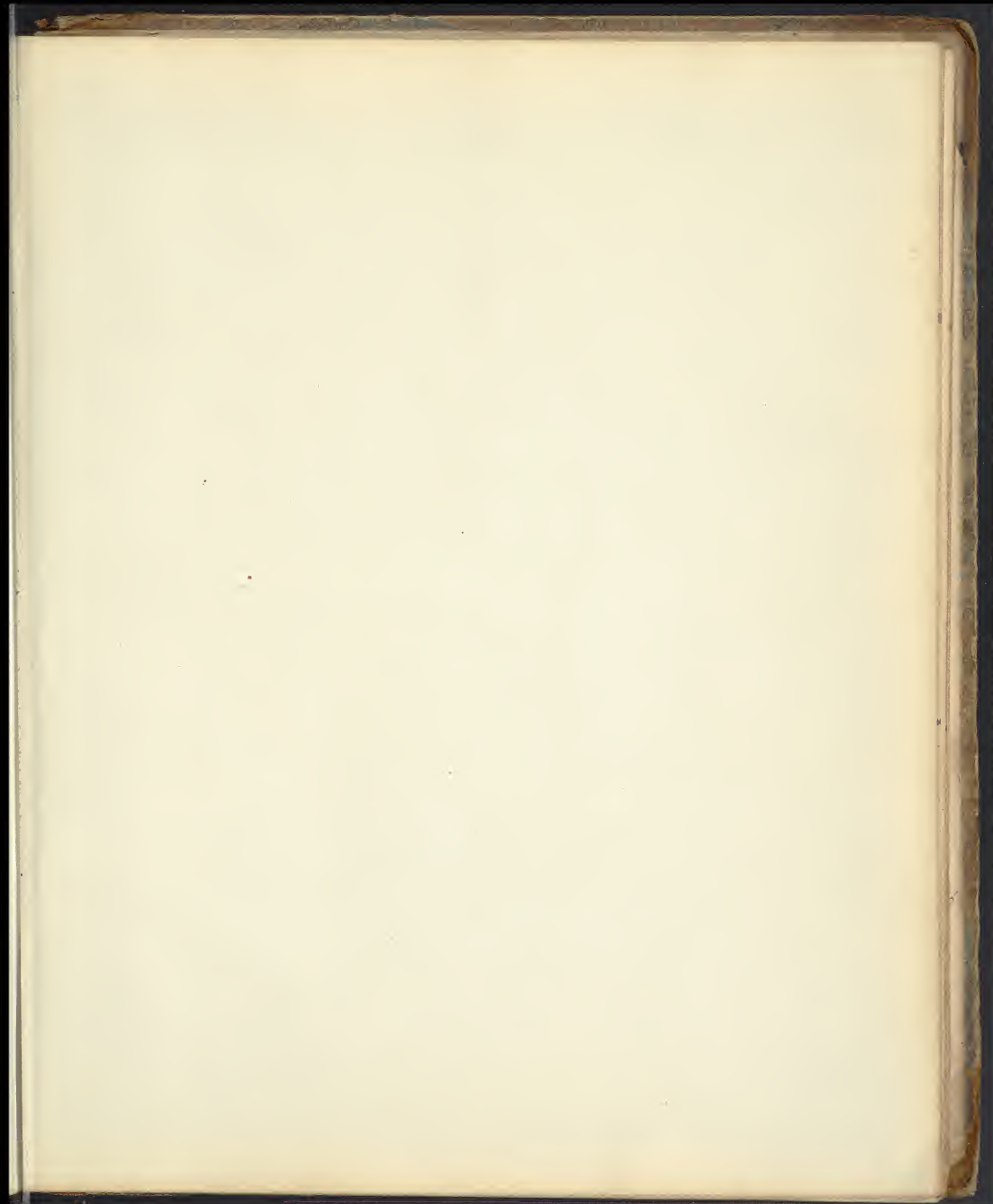


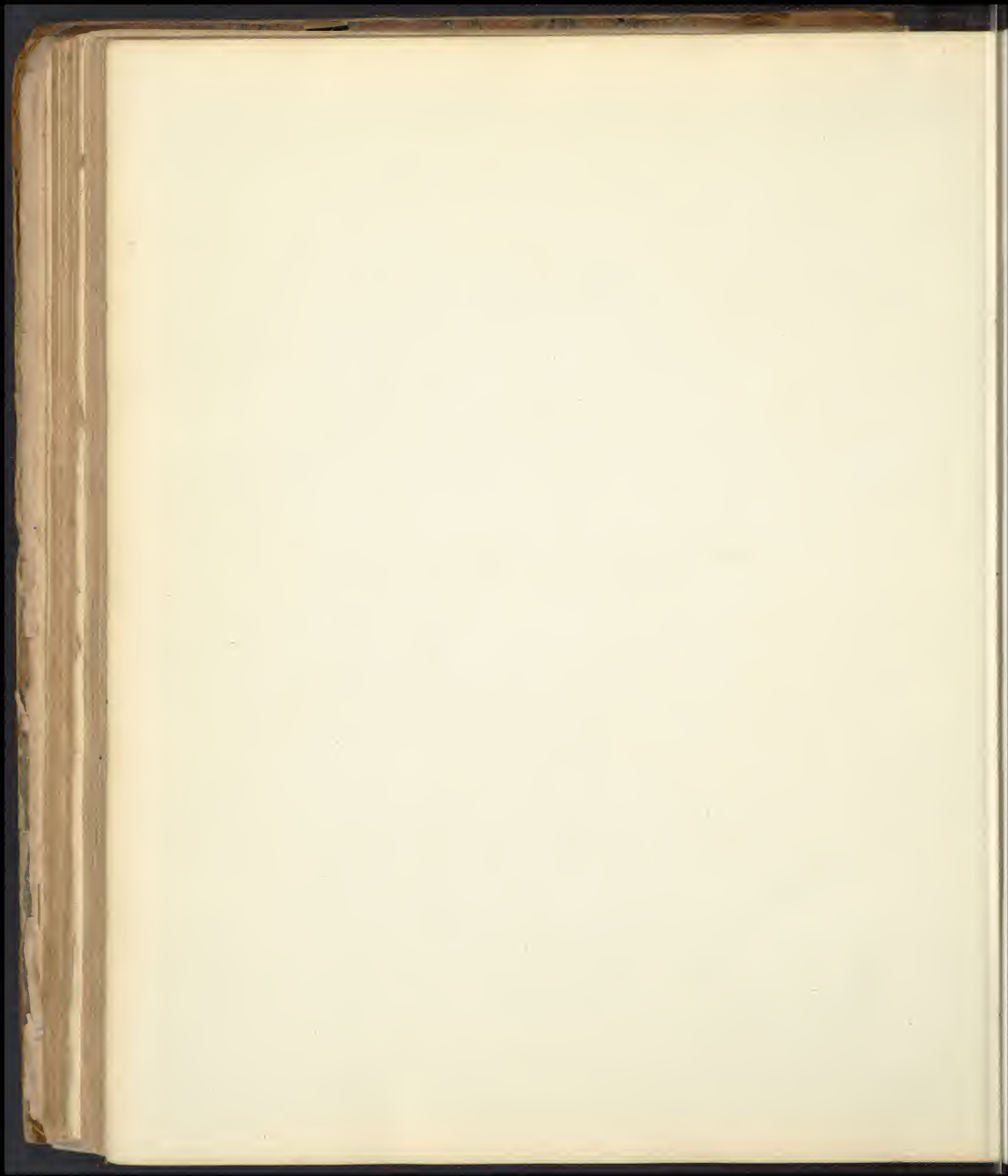


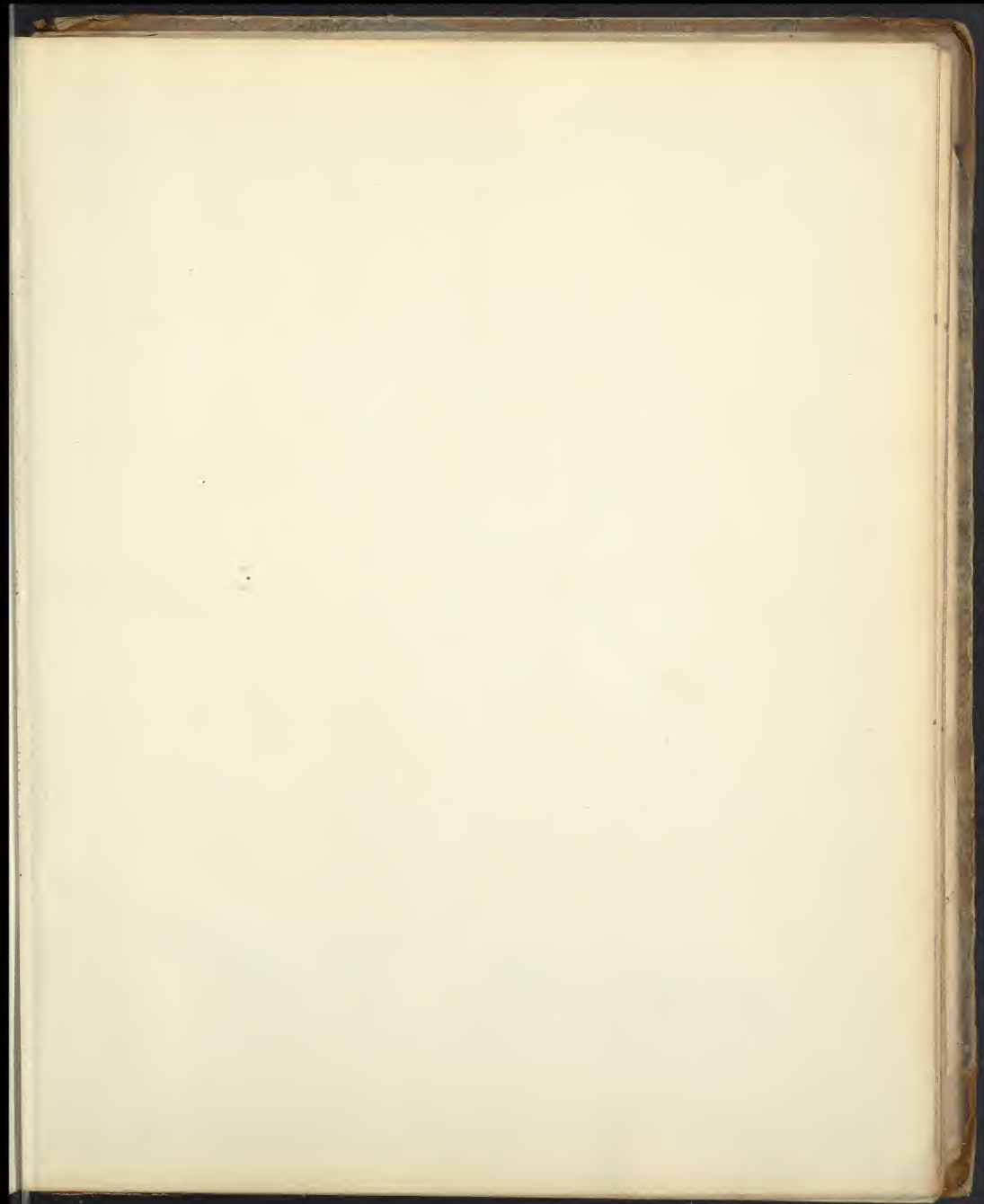


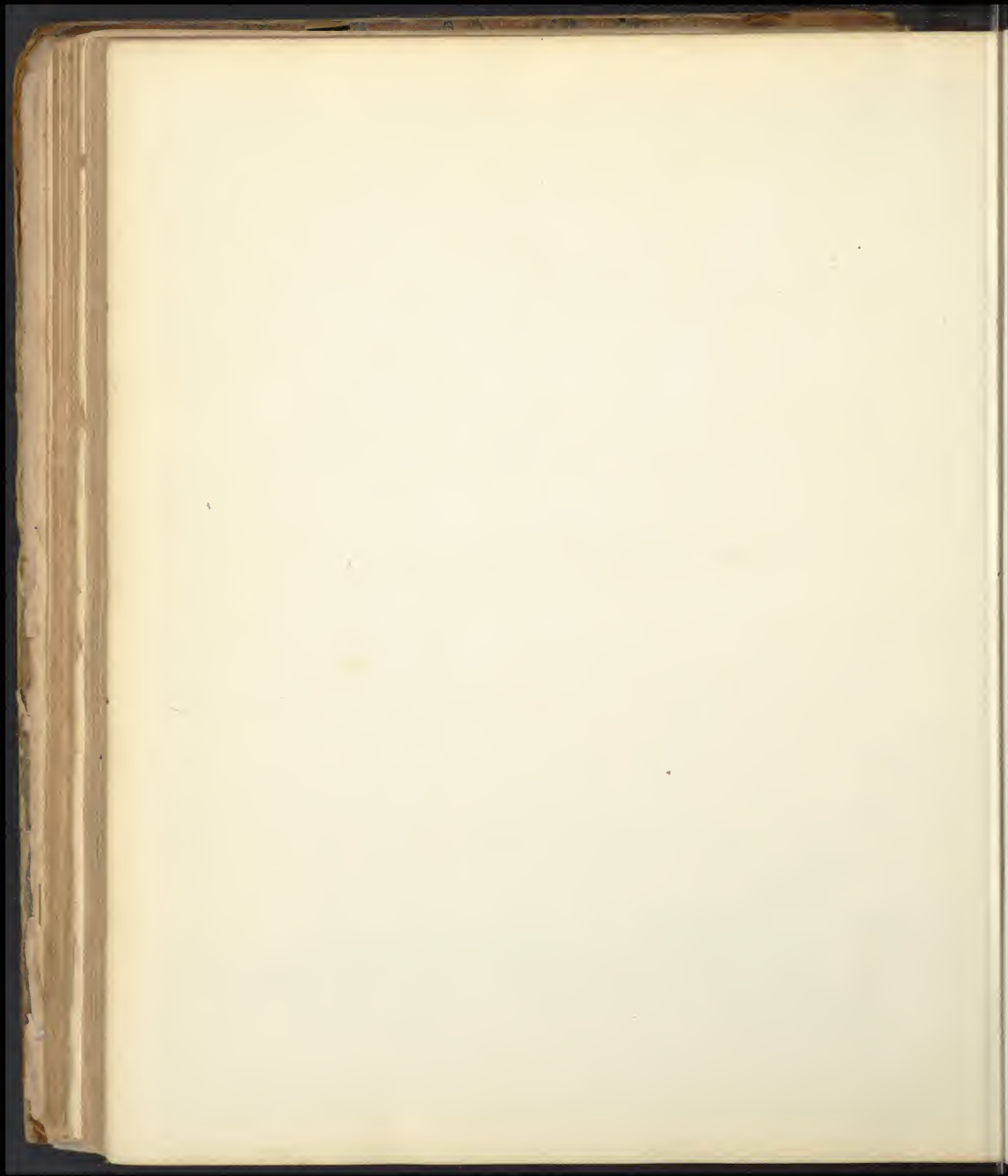


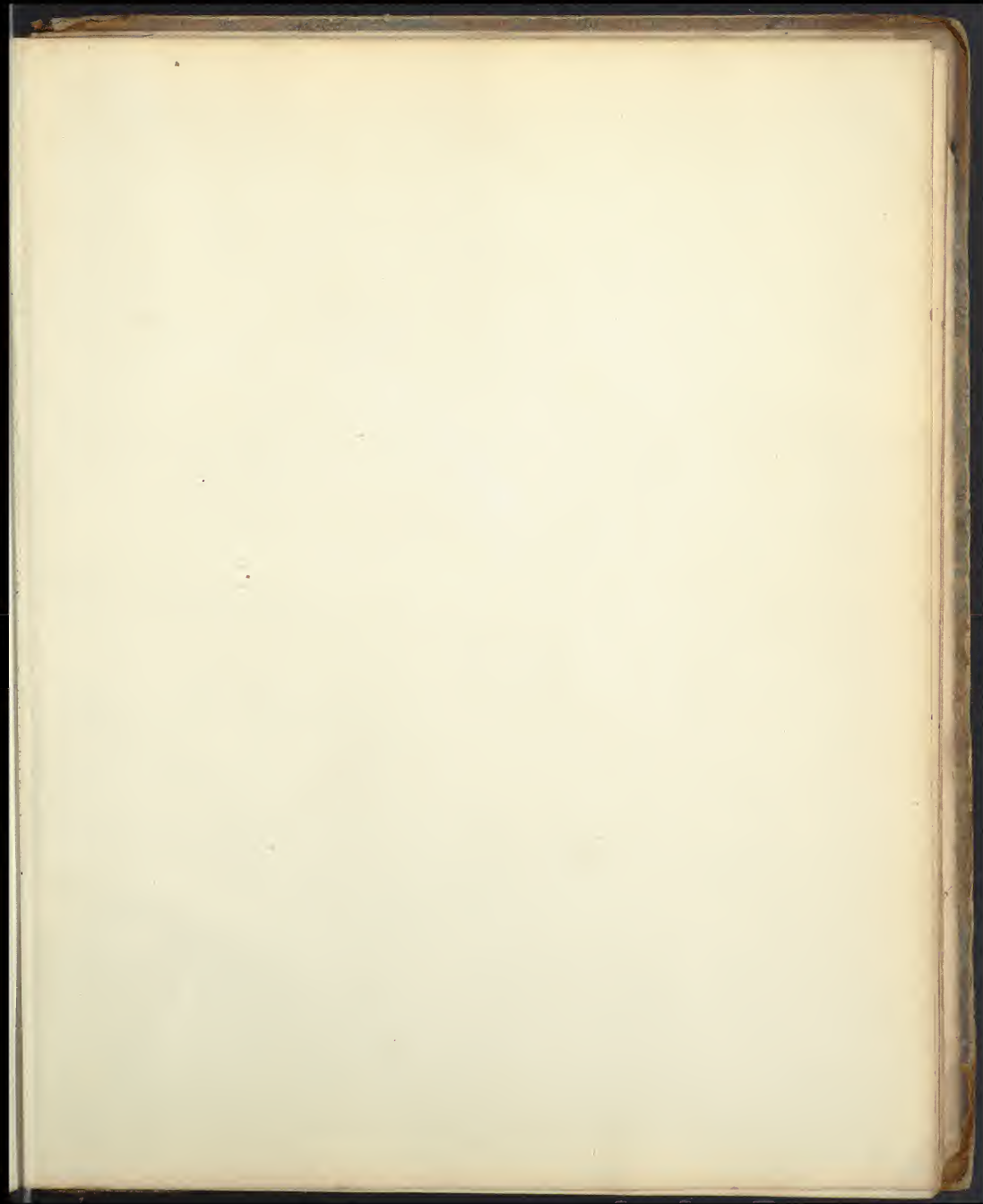


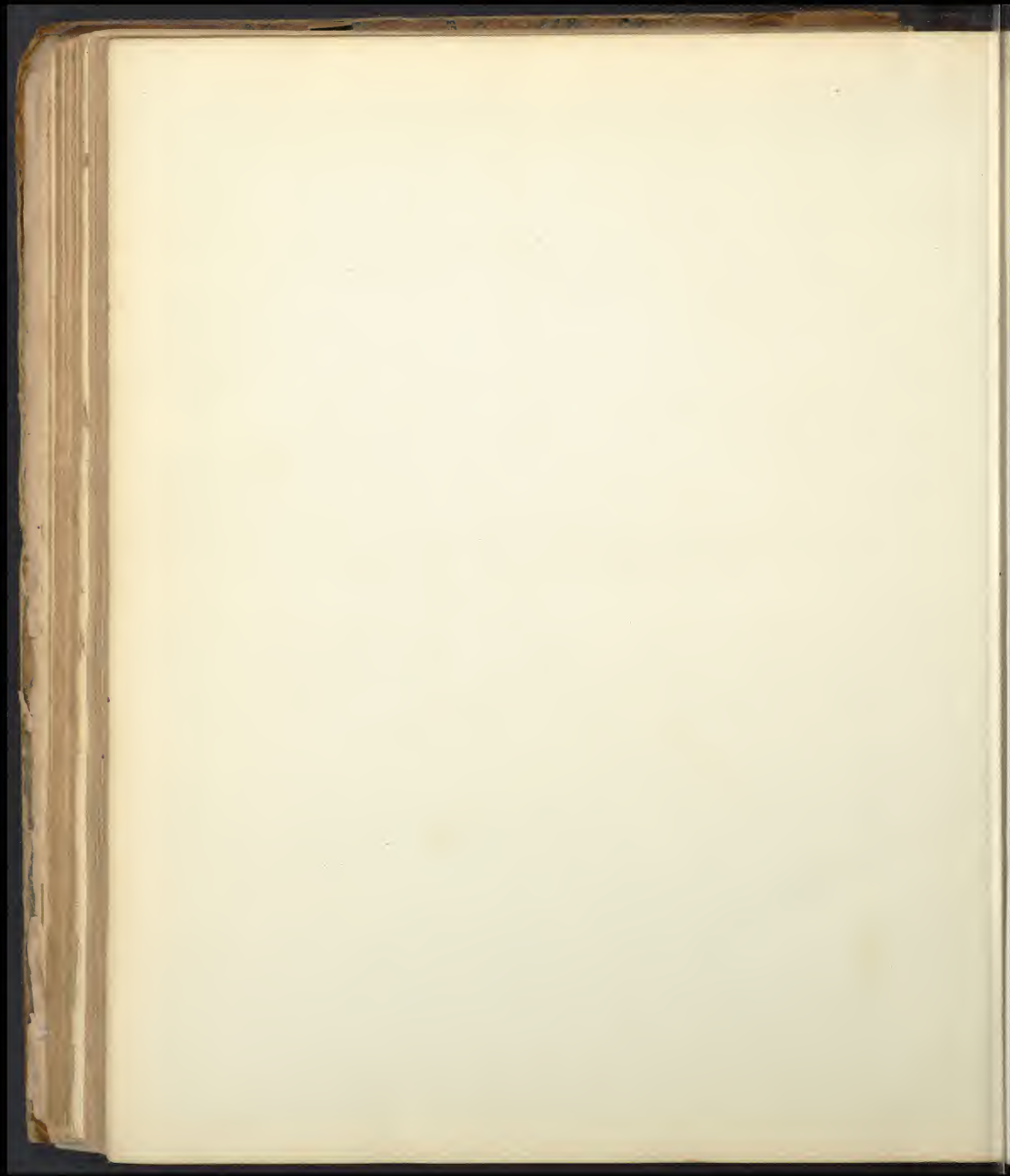




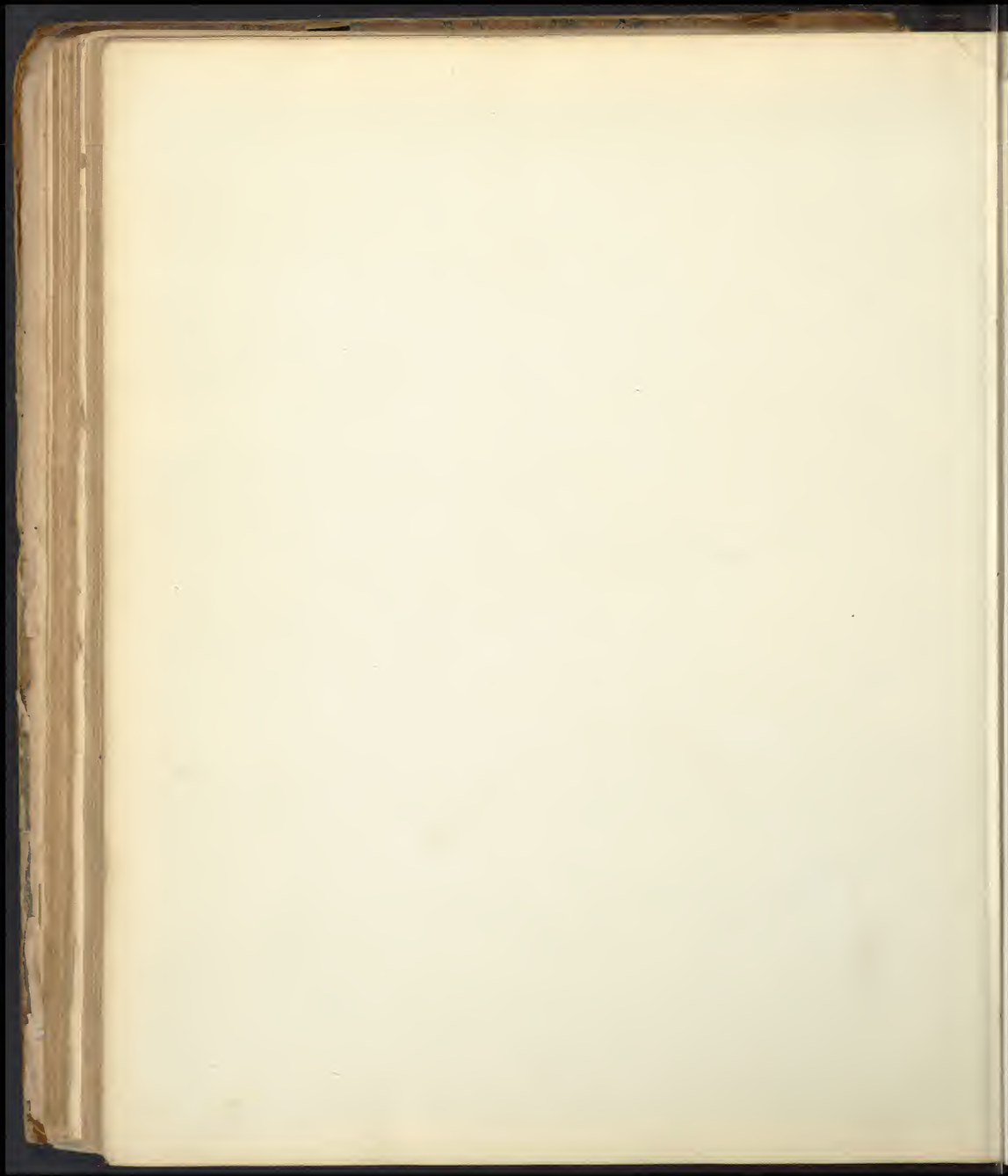


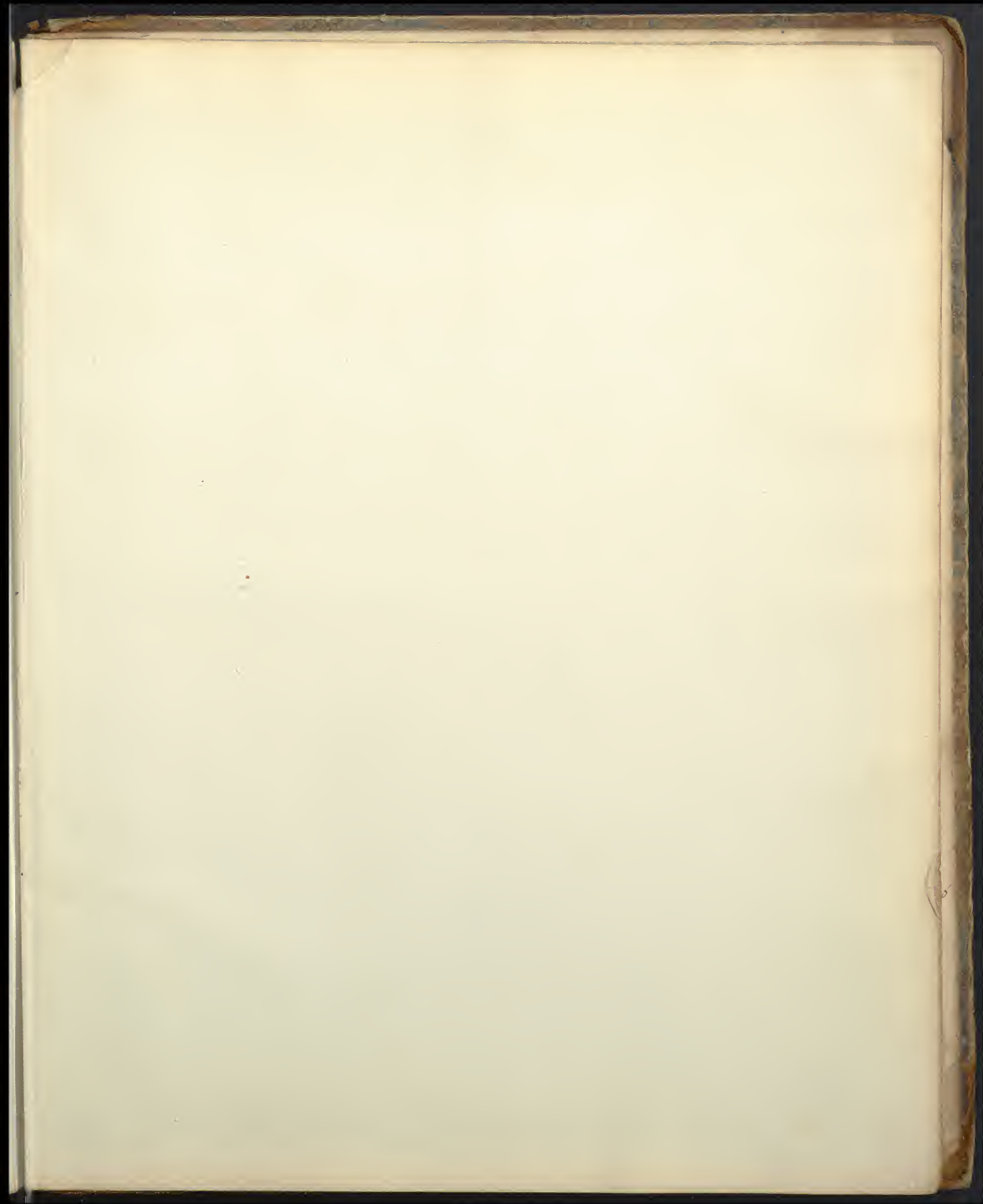


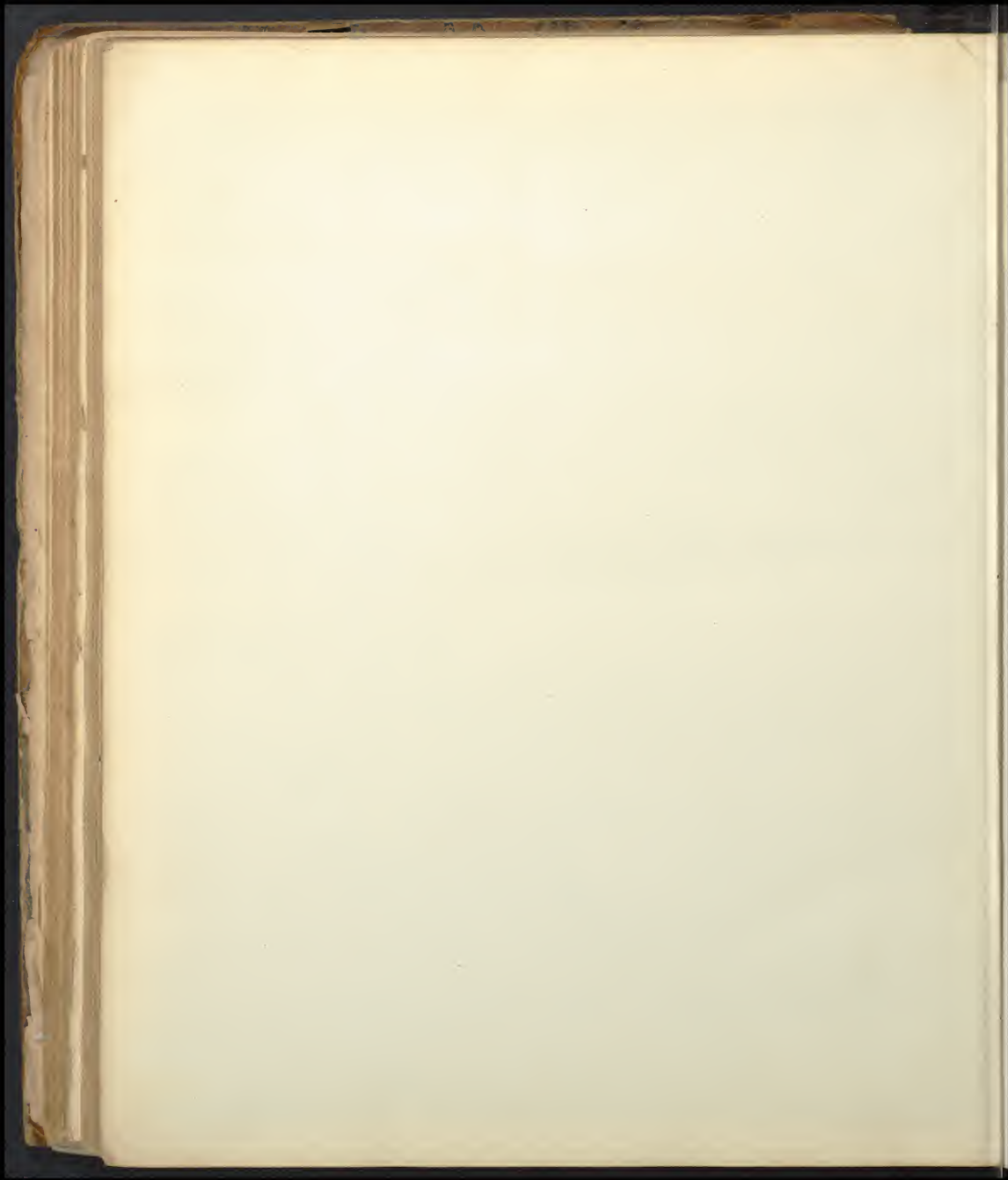


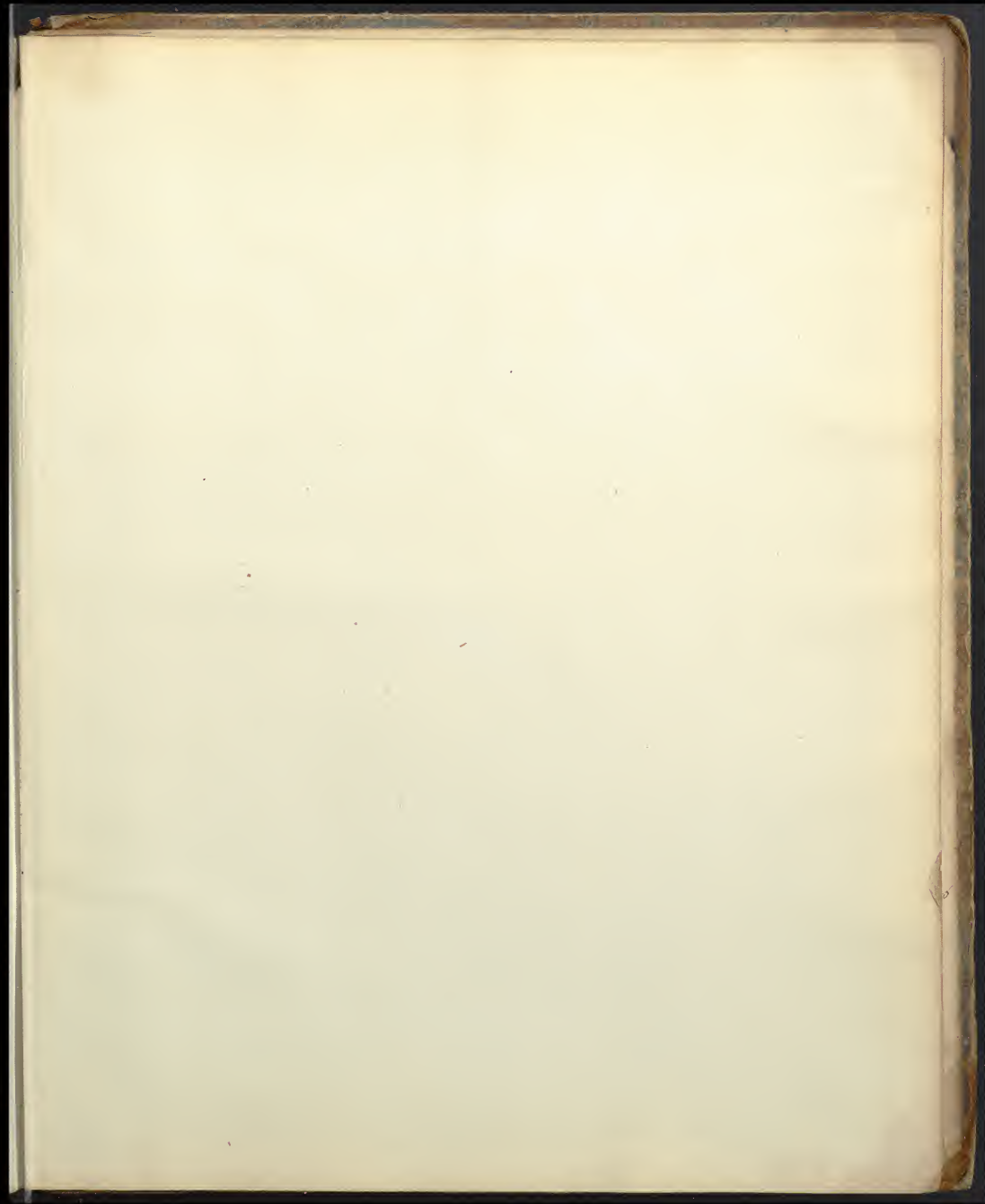
















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